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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~330~~. 66

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 1, 1886.

accession 23899

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 13, 1888.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1885, thereof, between The Missouri Pacific Railway Company, plaintiff, and The Chicago and Alton Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri,
By —— ——, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

1*a* *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 28th day of April, A. D. 1886.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2458. United States circuit court, eastern district of Missouri. Missouri Pac. R'y Co. *vs.* Chic. & Alton R. R. Co. Writ of error to the Supreme Court of the United States. Returned and filed 23rd day of February, 1886. A. P. Selby, clerk.

2 The United States of America to the Chicago and Alton Railroad company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein The Missouri Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 23rd day of February, in the year of our Lord one thousand eight hundred and eighty-six.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

Service of citation accepted.
Feb'y 25, 1886.

R. H. KERN,
Att'y for Def't in Error.

2*a* [Endorsed:] No. 2458. United States circuit court, eastern district of Missouri. Missouri Pac. R'y Co. *vs.* Chic. & Alton R. R. Co. Citation. Filed Feb'y 23, 1886. A. P. Selby, clerk.

3 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 28th day of October, A. D. 1885, there was filed in said court a certain amended petition in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States for the Eastern District of Missouri. Sep. Term, 1885.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Defendant.

Now comes plaintiff and, by leave of court, files this its amended petition herein, and says that it is a corporation duly organized and existing under the laws of the State of Missouri and a citizen thereof

and resident of the eastern district aforesaid; that the defendant, Chicago and Alton Railroad Company, is a corporation duly organized and existing under the laws of the State of Illinois and citizen thereof and a non-resident of the State of Missouri, and at the times hereinafter mentioned it was and now is a common carrier of goods and chattels for hire.

That on, to wit, the — day of March, A. D. 1884, the plain-
4 tiff delivered to defendant at East St. Louis, in the State of Illinois, and defendant, as such common carrier, then and there accepted and received from plaintiff twenty-one box cars, the property of plaintiff (laden with grain), in good order and condition, of the value of ten thousand dollars, to be by said defendant transported over its tracks to the advance elevator at East St. Louis, Illinois, there to be unloaded and returned by it to plaintiff at East St. Louis, Illinois, in like good order and condition, for a reward to it by plaintiff in that behalf paid; that said defendant has failed, neglected, and refused to return to plaintiff the cars delivered to it as aforesaid, whereby they became and are wholly lost to plaintiff, and by reason of said failure, neglect, and refusal of defendant to return said cars plaintiff has sustained damage to the amount of six thousand nine hundred and nine and $\frac{77}{100}$ dollars ($6,909.77), for which sum, with costs, plaintiff prays judgment against defendant.

THOS. J. PORTIS AND
BENNETT PIKE,
Attorneys for Plaintiff.

And afterwards, to wit, on the 28th day of October, A. D. 1885, there was filed in said cause an answer in words and figures following, to wit:

In the Circuit Court of the United States, Eastern District of Missouri.

MISSOURI PACIFIC RAILWAY CO., Plaintiff,
vs.
CHICAGO & ALTON RAILWAY CO., Defendant.

Defendant, answering plaintiff's amended petition in above cause,
denies each and every allegation therein set forth, save and
5 except such as may be hereinafter admitted as true. It admits that defendant is a common carrier as stated. It alleges that about — time stated nineteen of the cars mentioned were delivered to it at East St. Louis, Ill., by the St. Louis Bridge and Tunnel Company, to be carried by it to Advance Elevator, in said East St. Louis, but it states that it has no knowledge or information sufficient to say whether said St. Louis Bridge and Tunnel Company with said delivery of said cars was acting as plaintiff's agent or not. It alleges that it at said time promptly delivered seven of said cars to said Advance Elevator, and avers that said seven cars, together with the balance of aforesaid cars, were destroyed by fire at said time without

any fault or negligence of defendant. Having answered, it asks to go hence with its costs.

R. H. KERN,
Def't's Att'y.

And afterwards, to wit, on the 28th day of October, A. D. 1885, there was filed in said cause a replication in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Missouri, }

In the Circuit Court of the United States for the Eastern District of Missouri. Sep. Term, 1885.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Defendant.

Now comes plaintiff and, for reply to the new matter set
6 up in defendant's answer to the amended petition of plaintiff herein, denies each and every allegation thereof.

THOS. J. PORTIS AND
BENNETT PIKE,
Attorneys for Plaintiff.

On the 3rd day of April, A. D. 1885, there was filed in said case a stipulation waiving jury in words and figures following, to wit:

THE MO. P. R'Y CO. }
vs. } 2458.
CHICAGO & ALTON R'Y CO. }

It is hereby stipulated that a jury in this case is waived, and that it shall be tried by the court.
April 3, '85.

THOS. J. PORTIS,
Att'y for Pl'ff.
R. H. KERN,
Att'y for Def't.

And afterwards, to wit, on the 28th day of October, A. D. 1885, at a regular stated term of said circuit court of the United States for the eastern district of Missouri, the following further proceedings were had and appear of record in said court, to wit:

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff, }
vs. } 2458.
CHICAGO AND ALTON RAILROAD CO., Defendant. }

Now come the parties by their respective attorneys, the plaintiff by Bennett Pike, and the defendant by R. H. Kern, and by
7 consent of parties the plaintiff files its amended petition, to which defendant files answer, and the plaintiff files replication to said answer.

And this case being now regularly called for trial the same is sub-

mitted to the court, without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel and with leave to parties until November 4th to file briefs.

And afterwards, to wit, on the 5th day of November, A. D. 1885, the following further proceedings were had and appear of record in said court, to wit:

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Defendant. } 2458.

Now again come the parties by their attorneys—the plaintiff by Portis and Pike and the defendant by Robert H. Kern—and this case having been heretofore submitted to the court, without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel, upon consideration thereof and being fully advised in the premises, the court finds the issues for the plaintiff and assesses its damages at the sum of five hundred and two dollars and thirty-five cents ($502.35).

It is therefore considered by the court that the plaintiff, The Missouri Pacific Railway Company, have and recover of the defendant, The Chicago and Alton Railroad Company, as well the said sum of five hundred and two dollars and thirty-five cents, the damages aforesaid by the court assessed, as also the costs herein expended, and have thereof execution.

And afterwards, to wit, on the 23rd day of February A. D.
8 1886, the following further proceedings were had and appear of of record in said court, to wit:

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Defendant. } 2458.

Now comes the plaintiff by attorney and presents to the court its bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein; said plaintiff presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at said Supreme Court on the first day of the next term thereof, on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge, and said plaintiff also presents to the court its bond in the penal sum of eleven hundred dollars ($1,100.00), which bond is approved and ordered to be filed.

Said bill of exceptions is in words and figures following, to wit:

In the United States Circuit Court for the Eastern District of Missouri. September Term, 1885.

MISSOURI PACIFIC RAILWAY CO.
vs.
THE CHICAGO & ALTON RAILROAD COMPANY.

Be it remembered that the above-entitled cause came on for a

hearing, the plaintiff being represented by Bennett Pike, Esq., and the defendant by R. H. Kern, Esq., before the court, on October 28, 1885, when the following proceedings were had:

9 JOHN T. POUND, sworn and examined, testified as follows:

By Mr. PIKE:

Q. State to the court where you live and what is your business.

A. 2624 Caroline street, St. Louis.

Q. And what is your business?

A. Railroad clerk.

Q. What office?

A. At the junction of the bridge and the Missouri Pacific railroad.

Q. How long have you held that position?

A. About a year and a half.

Q. State what you know in reference to certain cars being delivered to the Bridge & Tunnel Company to be delivered to the Chicago & Alton for the purpose of being transported to the Advance Elevator, in March, 1884.

A. Cars delivered to the Bridge & Tunnel Company are delivered on certain tracks there. Our record shows each and every car delivered to them.

Q. Have you your record with you?

A. Yes, sir.

Q. State by whom that record was made.

A. This record is made by the clerks working under me at the junction.

Q. Under your supervision?

A. Yes, sir.

Q. And made substantially by you or through your clerks working under you?

A. Yes, sir.

Q. Read what cars and what numbers of cars were delivered.

A. I have the initials and car numbers.

Q. I mean cars to be transported to the Advance Elevator. Does your record show the distinction?

A. No; my record shows these cars going to the Bridge Company.

Q. State if car 1279, Missouri Pacific car, was delivered to the Bridge & Tunnel Company March 10th, 1884, according to your record, at 11 a. m.

A. Yes, sir.

Q. 2341, Missouri Pacific car—same day and hour?

A. Yes, sir.

Q. Please read those cars and the numbers and state
10 whether they were delivered at the time stated therein to the Bridge & Tunnel Company.

A. (Witness then referred to the record and said): 1279, Missouri Pacific, was delivered to the Bridge & Tunnel Company March 10, at 11 a. m.; 2341, Missouri Pacific, delivered the same day; No.

5442, Missouri Pacific, delivered the same day and hour; No. 7034, Missouri Pacific, delivered same day and hour; No. 890, M., K. & T., same day and same hour; No. 5813, M., K. & T., March 9, 10 p. m.; No. 6109, M., K. & T., March 5, 4.30 p. m.; No. 6498, M., K. & T., March 10, 11 a. m.; No. 6858, St. Louis, Iron Mountain & Southern, March 10, 11 a. m.; No. 4859, Wabash Red Line, delivered to the Bridge March 7, 3 a. m.; No. 1231, Wabash, delivered to the Bridge March 9, 10 p. m.; No. 11763, Wabash, delivered to the Bridge March 9, 10 p. m.; No. 7550, Atchison, Topeka & Santa Fé railroad, delivered to the Bridge March 9, 1.30 p. m.; No. 438, Kansas City, Fort Scott & Gulf, delivered to the Bridge March 7, 3 a. m.; No. 846, Kansas City, Fort Scott & Gulf, delivered to the Bridge March 10, 11 a. m.; No. 2901, Lake Shore & Michigan Southern, delivered to the Bridge March 9, 12.35 p. m.; No. 9270, Red Line, delivered to the Bridge March 7, 5.15 p. m.; No. 995, White Line, delivered to the Bridge March 7, 3 a. m.; 1254, C., C., C. & I., delivered to the Bridge March 11, 4.45 a. m.; 2124, St. Louis & San Francisco, delivered to the Bridge March 8, 12.35 p. m.; No. 3597, National Dispatch Line, delivered to the Bridge March 9, 9 a. m.; that is all the cars on the statement.

Q. You say these cars were delivered to the Bridge & Tunnel Company?

A. Yes, sir.

Q. What is that—a line of railway?

A. Yes, sir.

Q. Where does it run from—to what point?

A. It runs from the Union Depot yards to the East St. Louis yards.

11 Q. Aeross the bridge?

A. Across the bridge; yes, sir.

Q. What is the distance?

A. The distance I should judge to be about 4 or 5 miles.

Q. It is simply a transfer company, is it?

A. Yes, sir; a transfer company.

Q. For transferring cars from one side of the river to the other?

A. Yes, sir.

Q. Were those cars loaded?

A. Yes, sir; all loaded.

Q. With what?

A. I can't exactly say what they were loaded with.

Q. Do you know whether they were loaded with grain or not?

A. I can't say positively whether they were loaded with grain.

Q. Do you know to what points those cars were destined—where they were going?

A. No, sir; I do not.

Q. There is nothing on your record to show that?

A. No, sir.

Cross-examination by Mr. KERN:

Q. Can you tell where these cars were received and shipped from originally?

A. No, sir; I cannot.
Q. Don't your record show that?
A. My records don't show that; no, sir; not in this book.

The COURT: Whose record is that—what company?

A. The Missouri Pacific.
Q. They were all delivered by the Missouri Pacific, I understand your record shows, to the St. Louis Bridge & Tunnel Company to be carried by it?
A. Yes, sir.
Q. Do you know whether any of the records of the Missouri Pacific show where these cars started from originally?
A. I suppose Mr. Adams' record will show that.

By Mr. KERN:

12 Q. Now look at 2091 and 2124; do you know whether they were delivered to the St. Louis & San Francisco Railroad Company or not, or do your records show anything about that?
A. Our records don't show whether they were San Francisco cars or Missouri Pacific, or came over their road or not.
Q. You have nothing in that record to show?
A. No, sir.
Q. You simply know those cars were delivered to the Bridge & Tunnel Company?
A. Yes, sir.
Q. Do you know to whom they were delivered after the Bridge & Tunnel Company received them?
A. I do not.

THOMAS P. ADAMS, sworn and examined, testified as follows:

By Mr. PIKE:

Q. Where do you live and what is your business?
A. St. Louis. I am a railroad agent of Missouri Pacific Railroad at 7th and Poplar—local freight agent.
Q. How long have you been occupying that position?
A. Since April 1st, 1884. Prior to that time I was chief clerk at the station.
Q. In the same office?
A. Yes, sir.
Q. You are what is called station agent?
A. Yes, sir; local freight agent.
Q. State to the court what you know in reference to these cars that were testified to by the preceding witness, in reference to their delivery to the Bridge & Tunnel Company, and where destined to, if you know, and what became of them.
A. As to all of them, sir, without having the record before me, I can't say exactly where they were destined to, but the majority, I know, were destined to the Advance Elevator.
13 Q. The Advance Elevator where?
A. East St. Louis, on the Chicago & Alton tracks.

Q. What do you know, if anything, in reference to the delivery by the Bridge & Tunnel Company to the Chicago & Alton Company of those cars?

A. I know they act as a transfer company to transfer cars from the Missouri Pacific railroad to any railroad in East St. Louis. Cars given to them by us to go to the Chicago & Alton to go to East St. Louis are delivered to them on the east side of the river.

Q. By what roads are cars delivered by the Missouri Pacific to the Bridge & Tunnel Company for the Advance Elevator; over what road must they go; by what road must they be received, and over what line do they run?

A. They must be received on this side by the Chicago & Alton railroad and taken by their line over to the elevator.

Q. What do you know in reference to the condition of those cars, whether they were ever returned by the Chicago & Alton to the Missouri Pacific Railroad Company?

A. There is a record kept——

Q. I am not asking as to the particulars, but, as a matter of fact, what you know in reference to any of the cars described here being returned; and, if so, what was their condition?

A. My recollection is none of them came back in good condition and some of them never got back at all.

Q. Some were burned up?

A. Yes, sir.

Q. And others—what was their condition?

A. That, sir, I can't state exactly.

Q. Do you know where those cars came from and with what they were loaded; where they came into the possession of the Missouri Pacific Railroad Company, and with what were they loaded?

14 A. My recollection is a majority of them were loaded with grain and came off the Missouri Pacific line, from local stations along their line, to go to the Advance Elevator, to East St. Louis; one or two of them, though, were received from St. Louis & San Francisco railroad at their junction west of Grand avenue—two, I think.

Q. Two of the cars mentioned here were received from the San Francisco?

A. Yes, sir; given to us to transport to the other side of the river.

Q. Do you know anything about the usage, if any, or the understanding between the Missouri Pacific and the Chicago & Alton as to the delivery of cars to it by the Bridge Company and as to their being returned; what was the usage or custom prevailing between the plaintiff and defendant, if you know?

A. The custom is cars are received from the Transfer Company—that is, the St. Louis Bridge & Tunnel Company—and on being received there are delivered to the Chicago & Alton Railroad Company, just passing through the transfer, a sort of switching business or transfer company.

Q. Suppose cars are received from the Chicago & Alton, delivered to the Transfer Company, belonging to the Missouri Pacific Company, what is the understanding and usage in reference to those cars

destined to the Advance Elevator, for instance; what is the usage and understanding as to the return of those cars?

A. The understanding is the cars shall be returned back to the Missouri Pacific railroad after they are empty.

Q. Cars received by the Chicago & Alton Railroad Company to be transported over its line to the Advance Elevator, after being unloaded by the Chicago & Alton, are to be returned to the Missouri Pacific or to the Bridge Company for them?

A. Yes, sir.

15 Q. That is the usage, is it, as far as you know?

A. Yes, sir.

Q. Do you know of any other usage than that among the railroads in the city of St. Louis and East St. Louis?

A. No, sir; that is all I can state, sir.

Q. I will ask you to state if the M., K. & T. and the St. Louis and Iron Mountain are a part of the Missouri Pacific system?

A. Yes, sir.

Q. Cars called the M., K. & T. cars and the St. Louis and Iron Mountain cars belong to the Missouri Pacific?

A. Missouri Pacific system of railroads; yes, sir.

Q. You know nothing about this fire that occurred in East St. Louis?

A. No, sir.

Q. Do you know anything about these papers; did they come from your office?

A. I have seen the papers before.

Q. State if you know where these papers came from, if you know anything about it.

A. That paper was made out by C. W. Meade, the travelling car-tracer of the Missouri Pacific.

Q. He is one of the Missouri Pacific employés?

A. Yes, sir.

Cross-examination by Mr. KERN:

Q. Mr. Adams, you say all these cars except two of them that were received from the St. Louis & San Francisco were cars loaded at local points on the Missouri Pacific and sent to St. Louis to be transferred to the Advance Elevator?

A. Yes, sir; that is my recollection.

Q. Do you know what those cars you received from the St. Louis & San Francisco railroad were loaded with?

A. I don't remember just now, sir.

Q. Do you know their destination, whether to the Advance

16 Elevator or some other point?

A. Those two particular cars, I do not, sir.

Q. Did the Missouri Pacific obtain any receipt for those cars as they delivered them to the Bridge Company?

A. When they were delivered they acknowledged the receipt—that is, they took the same record we had of cars, and in addition to that they receipted for the bills, and that record is the evidence that the cars were delivered to them.

Q. What is that?

A. That record conceded the delivery of the cars to the Bridge Company. Custom makes that the acknowledged receipt.

Q. You mean the record in the hands of Mr. Pound, the preceding witness?

A. Yes, sir.

Q. Do you know what receipt the St. Louis Bridge & Tunnel Company or the Missouri Pacific obtained—what receipt, if any, they obtained from the Chicago & Alton when they delivered these cars to it?

A. No, sir; I do not.

Q. You do not know whether they received any or not?

A. No, sir; I do not.

Q. Do you know what relationship existed between the St. Louis Bridge & Tunnel Company and the Missouri Pacific in delivering this freight?

A. The cars to the Advance Elevator are delivered to the Chicago & Alton railroad for the Missouri Pacific to go into the Advance Elevator—that is, they are in the hands of the Missouri Pacific railroad. I understand the money is payable to us by the Advance Elevator, the freight money, and the Missouri Pacific sent them over there for their account until the freight money is paid by the Advance Elevator.

Q. Do you know where these cars are delivered to the Chicago & Alton Railroad Company?

A. In East St. Louis.

17 Q. Do you know whether they are delivered to the bridge as the connecting line or as the agent of the Missouri Pacific?

A. I should consider them as the agent—transfer the cars as the agent of the Missouri Pacific railroad.

Q. As the agent of the Missouri Pacific?

A. Yes, sir.

The COURT: What is the last remark?

A. I should consider them as the transfer agent to transfer the cars for the Missouri Pacific over to East St. Louis.

(By Mr. PIKE:)

Q. I understand you to say one or two of these cars were loaded with something else than grain?

A. That is my recollection.

Q. With what were they loaded?

A. That I can't state.

Q. They were not loaded with grain?

A. I think not.

Q. I mean the cars destroyed or burned?

A. I don't think they were loaded with grain. I think several were loaded with other kinds of freight.

(By Mr. KERN:)

Q. Do you know anything about the extent of the destruction of

those cars; what were returned, if any, or are you familiar with that?

A. No, sir; I am not.

JOHN HODGE, sworn and examined, testified as follows:

(By Mr. PIKE:)

Q. Where do you live?

A. St. Louis.

Q. What is your business?

A. I am a master car-builder of the Missouri Pacific.

Q. How long have you held that position?

A. About 15 years.

Q. State if you know anything about these cars that were burned or injured at the fire on the 11th of March at the Advance Elevator in East St. Louis.

18 A. I know there were cars burned at that time.

Q. At the Advance Elevator?

A. Yes, sir.

Q. Belonging to the plaintiff, The Missouri Pacific?

A. Yes, sir.

Q. How many of those cars were burned?

A. I think about 21 were burned and injured; not all destroyed.

Q. Have you a list of them; did you take a list at the time?

A. Yes, sir; we have a list of them.

Q. Have you the list with you?

A. Yes, sir.

Q. Is it a part of your duty to keep a record of the cars burned or destroyed or that you repair?

A. It is a part of our business to keep a record of the cars destroyed or injured.

Q. Is that the record you hold in your hands?

A. That is the record that I hold in my hand of those cars that came back from East St. Louis to the Missouri Pacific shops partially destroyed and wholly destroyed, with the exception of the refuse.

Q. Were those that were destroyed brought back?

A. They were loaded upon flat cars and fetched from East St. Louis to the Missouri Pacific shops at 29th street.

Q. Read the numbers of the cars, if you have them, or any other descriptive marks that were on them.

A. Missouri Pacific car 1279; Missouri Pacific car 2341.

Q. Now state what was the condition of car 1279.

A. That car, my recollection is, was wholly destroyed.

Q. Your record shows the amount of injury?

A. Yes, sir.

Q. What was the value of that car?

A. The value that is placed on the cars of that date by the master car-builders' rules, I think, was $500, with the depreciation of six per cent. per annum from the time the car was built until the

19 destruction of the car.

Q. Was that the universal mode or usage at that time of estimating the value of cars destroyed or injured?

A. Yes, sir.

Q. What had the Chicago & Alton Railroad Company, if you know, to do with that arrangement or usage?

A. I think they belonged to that arrangement in settling the cars.

Q. It was settled then by the rules of the Master Car-Builder Association?

A. Yes, sir.

Q. And that car you mentioned was worth $500, less 6 per cent. for each year?

A. That was the rules that were given in settling for cars destroyed.

Q. What is your estimate of the amount of damage there by that rule?

A. $304.79.

Q. That would indicate how old the car was?

A. Yes, sir.

Q. A car, new, worth $500 you would deduct 6 per cent. each year?

A. Yes, sir.

Q. Now, the next?

A. Missouri Pacific car 2341.

Q. What was the condition of that when it came back?

A. It was destroyed, according to this record.

Q. What was the value of that, according to your rules?

A. The value was placed at $483.91.

Q. That car was not much over a year old, was it?

A. No, sir.

Q. Now, the next one?

A. Missouri Pacific car 5442; value of that car when destroyed, $431.90.

Q. Now, the next one?

A. The next car is the Missouri, Kansas City & Texas, 890; the value placed on that car was $386.47.

Q. These were all box cars you mentioned?

20 A. My recollection is this was for box cars; I haven't got them marked box or other kind, but my recollection is they were box cars. Next car is the Missouri, Kansas City & Texas, 6109—value, $445.68; next, Missouri, Kansas & Texas car 6498; $459.47. The next is the St. Louis, Iron Mountain & Southern, 6858—value, $445.68; next, Wabash, St. Louis & Pacific railroad car 4859—value, $394.53; next, Atchison, Topeka & Santa Fé car 7650; the trucks of this car were saved; the value of the body of the car was $244.58. The next car, Kansas City, Fort Scott & Gulf, 438; the value of that car is $481.70. The next is the Lake Shore & Michigan Southern car 2091—value, $378.67; next, Lake Shore & Michigan Southern, 9270—value of this car, $304.80; next, New York Central & Hudson River railroad, 995—value, $253.15.

Q. That was called the White Line, wasn't it?

A. I presume probably it was. I am not prepared to say whether it was a white car; I am not prepared to state the color of the car.

Q. But that was the number, 995?

A. That was the number. I have got the value of the car $253.15. The next car is the Cleveland, Columbus & Cincinnati, 1254—value, $398.68; the next is St. Louis & San Francisco, 2124—value of this car, $223.68. That is the 15 destroyed cars.

Q. Now, the others that were damaged?

A. Missouri Pacific box cars 7034; damaged $52—damaged by fire; next, Missouri, Kansas & Texas, 5813—damage, $273; next, Wabash, St. Louis & Pacific, 1231—damage, $83; next, Wabash, St. Louis & Pacific, 11763—damage, $273; the next, Kansas City, Fort Scott & Gulf, 864—damage, $15; next, National Dispatch Company, 3497; $70.

Q. And the whole amount is what?

21 A. The total amount is $6,363.68, and those figures are correct.

Q. State what was done by the plaintiff railroad company in reference to those cars that belonged to other roads—that is, to the Wabash, the St. Louis & San Francisco, the Fort Scott & Gulf road, the Red Line, New York Central, and so on. What did the plaintiff railroad company do with reference to those cars, as to paying for them—the foreign cars?

A. They were paid for, my recollection is, by the Missouri Pacific Railroad Company.

Q. Through whose hands did the voucher pass?

A. Started in my office and went from there to the auditor.

Q. You made the voucher yourself?

A. Yes, sir.

Q. And the money was paid, the amount you have stated, as the damage or value?

A. That is my recollection.

Cross-examination by Mr. KERN:

Q. Will you look at car 438, which you have testified in regard to Kansas City, Fort Scott & Gulf—are you able to state whether the trucks of that car were returned to the Missouri Pacific or not?

A. I can't state whether the trucks were returned to the Missouri Pacific or not.

Q. You were the car-builder—the man who had charge and superintendence of it?

A. Yes, sir; these cars came back in such a condition that it was impossible to identify one truck from another, almost.

Q. What did you consider the value of the entire trucks—have you got no separate memorandum—the entire number of trucks returned to you by the Chicago & Alton?

A. We have no account of trucks returned to the owners of the cars with the exception of the Atchison & Santa Fé.

22 Q. Now, the list of the cars you have testified to in regard to the damaged condition—were any of those cars returned to you?

A. They were returned to me in damaged condition.
Q. They were brought back on trucks?
A. Yes, sir; that is my recollection now.
Q. Do you know anything about the number of trucks returned to you, if any outside of the cars, in a damaged condition?
A. No; I don't recollect the number. I think by referring to the books I would be able to ascertain. I know there were some trucks returned.
Q. About how much would the trucks of each one of those cars, assuming that you took them and put them together, and that they were sufficient for one car—how much were they worth, separately, as returned to you?
A. They were returned to us as scrap; we called them scrap.
Q. I understand—but they had some valuation. What did you consider they were worth?
A. I have not the price of scrap allowed for the particular trucks at that time. I don't recollect just now what the value of scrap was placed at.
Q. You consider this a fair valuation that you have testified to of those cars?
A. I do, sir; the figures are correct, from the master car-builder's rules, which they all settled by and worked from since those rules were first adopted.
Q. That was the basis of settlement now between the Missouri Pacific and its connecting lines and between railroads generally, is it?
A. Yes, sir.

(By Mr. PIKE:)

Q. You said the scrap you allowed in the estimate of damages for the car, didn't you, that you have given?
A. Yes, sir; that is my recollection.
Q. When you speak of a car being damaged $50, you allowed for scrap?
23 A. If the car was damaged $50 it would have no scrap in connection with that car; it would be simply the wood material that had been destroyed.
Q. But where a car was destroyed and the scrap returned you allowed for the scrap, did you?
A. Yes, sir; that is my recollection now.

(By Mr. KERN:)

Q. What do you consider the trucks of a car ordinarily worth?
A. New trucks for a car are worth $225 to '30 at the present time.

A. W. DICKINSON, sworn and examined, testified as follows:

(By Mr. PIKE:)

Q. You are superintendent of the terminal facilities of the Union Depot and Bridge & Tunnel Company?
A. Yes, sir.

A. Yes, sir; original bills accompanying these cars were destroyed.

Bill referred to offered in evidence as follows:

Form 1167. 12-84-25 M.

Poplar St. W. B. Ex. No. —.

The Missouri Pacific Railway Co.

ST. LOUIS STATION, *March* 10, 1884.

Transfer Way-Bill of Freight from Mo. Pac. R. W. to C. & A. R. W.

Original W. B. 167; car 1476; initials M. P; where from, State Line; date of way-bill, 3-4.

Consignor.	Consignee and destination.	No. packages.	Articles.	Weight.	Freight and charges.	Switching.	Total to collect.
F. B. R.	R. L. McCormick & Co., c. o. Advance Elevator, E. St. Louis.	.....	Corn				

Mo. Pac. paye- t'f'r.

27 Q. Now state, in your own way, exactly what became of those cars after they were delivered to the Chicago & Alton at East St. Louis, as testified to.

A. The cars were received from the bridge, switched into the East St. Louis yard, delivered to the Advance Elevator to be unloaded.

(By the COURT:)

Q. On whose track—yours?

A. The Chicago & Alton tracks.

(By Mr. KERN:)

Q. State what became of those cars; how many of them were switched in there, if you are able to tell?

A. The cars had all been delivered to the Advance Elevator, with the exception of three or four which they were not ready to take in and were not unloaded at the time they were destroyed by the fire.

Q. That is to say, the Chicago & Alton switch has a track that runs up to the Advance Elevator?

A. They did run up to the Advance Elevator.

Q. And they had been delivered upon that track. Had the Advance Elevator accepted them?

A. The Advance Elevator had accepted them and had unloaded a portion of them.

Q. Do you know how many?

A. I will have to see my letter book before I can tell exactly.

Q. Can you state how many of them the Advance Elevator had accepted?

A. All except four.

Q. Do you know what four they were?

A. I can tell by looking at my book. (Refers to book and continues.) 1254, C., C., C. & I.; 6109, M., K. & T.; 4859, Wabash; 438, Kansas City, Fort Scott & Gulf.

Q. Those four cars had not been accepted by the Advance Elevator and were burned?

A. Yes, sir.

Q. Do you know anything about the nature of that fire?

28 A. It caught on the levee in a Front-street building and communicated to a stable, and then the Advance Elevator and our freight office, and then to the cars.

Q. You heard Mr. Hodge's testimony in regard to the cars returned to the Missouri Pacific?

A. Yes, sir.

Q. Was that a correct statement of the number of cars returned?

A. If I recollect right, he didn't say how many cars were returned. I don't think the question was asked how many were returned.

Q. I think he testified that 6 were returned in a damaged condition and the balance were lost. You have here a statement of 6 cars that were returned to the Missouri Pacific, the same 6 testified to by him, in this statement you furnish.

A. There was the trucks of 6, if I recollect right, that were returned.

Q. In speaking in regard to the trucks and about the cars themselves, he testified 6 of those cars were returned in a damaged condition.

A. It is either 6 or 7.

Q. You don't know anything about the extent of the damage to them?

A. No, sir; I do not. The cars were built to run on their own trucks.

Q. You didn't examine to find how much they were burned?

A. No, sir.

Q. I will read for your benefit. Here are cars 890, 2341, 6198, 5042, 2181, 9276, 6858. Do you know what has become of those?

A. Those are still in the ruins of the elevator. The trucks remained there.

Q. You don't know anything about the condition?

A. They are there all burned up except the iron.

Q. Now, how many pounds of scrap iron were returned of those trucks; have you any idea how many pounds?

A. No, sir; I have not.

29 Q. As much as a thousand?
A. Yes, sir; more than that.
Q. 3,000?
A. I can't say what the wheels would weigh; I don't know.
Q. Do you think there was as much as 3,000?
A. Yes, sir; much more than that.
Q. 10,000?
A. I should say more than 10,000.
Q. Are you willing to swear there was at least 10,000 pounds of scrap iron returned?
A. Yes, sir.
Q. Do you know anything about the value of it?
A. No, sir.

Cross-examination by Mr. PIKE:

Q. Mr. Lake, you said these cars which were destroyed were standing on the Chicago & Alton tracks, did you?
A. No, sir; I didn't say that; I said these four cars were standing on the Chicago & Alton tracks.
Q. Where did the other cars stand?
A. 7 of them were standing on the other tracks in the ruins of the elevator.
Q. What do you mean by their being delivered to the Advance Elevator and their accepting the cars?
A. They were put in the Advance Elevator for unloading.
Q. Did they have a special track of their own?
A. Assuredly.
Q. The track runs past the elevator?
A. Right through the house.
Q. And your tracks run right beside it?
A. Our tracks run right alongside the house.
Q. And you say four were standing on your tracks?
A. Four, I say, had not been delivered to the elevator; they were standing on our tracks—the four I mentioned.
Q. How many cars can you get to the Advance Elevator
30 at one time to unload?
A. They could when it was an elevator—they had standing room for 28 cars.
Q. On their tracks?
A. Yes, sir; their tracks extended beyond, up towards ours, so as to allow the empties after they were unloaded—to allow the empties to run by.

The COURT: Side tracks?
WITNESS: No, sir; tracks right into the elevator belonging to them; they owned the ground on which all their cars were standing and connecting with us.

Q. You spoke of St. Louis & San Francisco cars. Were they burned there at the same time?
A. One St. Louis & San Francisco and one Lake Shore & Michigan Southern.

Q. Where were they?
A. On our track.
Q. Were they two of the four you mentioned?
A. No, sir.
Q. Where were they as regards the four that were burned?
A. There were 6 to 7 tracks between them.
Q. They were still on the Chicago track?
A. Yes, sir.
Q. I understand the fact is 6 out of this number of cars were burned on the Chicago & Alton tracks and the balance were burned on the tracks of the Advance Elevator?
A. No, sir.
Q. Well, let us understand it.
A. There were 6 cars that were four of the cars I mentioned that had not been delivered to the Advance Elevator that were on our tracks and were burned. The two cars from the 'Frisco road were standing on our track and the balance of the cars were on our tracks, but had been unloaded by the elevator. They were empty cars, excepting the cars you mentioned, that I stated were still in the ruins of the Advance Elevator.
Q. Were those you mentioned still in the ruins on the tracks of the Chicago & Alton railroad or on the tracks of the Advance Elevator?
31 A. They were on and are yet the tracks of the Advance Elevator.
Q. The balance of those cars were burned on the tracks of the Chicago & Alton?
A. Yes, sir.
Q. When those empty cars were left there, why were they not returned?
A. The time was too short. They should have gone and would have gone that night but for the fire.

(By Mr. PIKE:)

Q. I understand you to say all these cars except, 7 now on the tracks there, were on the tracks of the Chicago & Alton at the time of the fire?
A. Yes, sir.
Q. And had been into the elevator and unloaded, most of them?
A. Except those four.
Q. They had not gone in?
A. No, sir.
Q. The rest had gone in and been unloaded and put back on your tracks—run out of the elevator—excepting the 7 that are still on the elevator tracks?
A. That are still in there now.

(By Mr. KERN:)

Q. Do you know anything about the value of those cars?
A. Nothing.

This was all the testimony offered in the case.

There were no declarations of law asked for or given by the court.

The court on the 25th day of Nov., A. D. 1885, found the issues for the plaintiff and assessed its damages at the sum of five hundred and two and $\frac{35}{100}$ dollars, for which amount judgment was rendered.

Plaintiff thereafter, to wit, on the 7th day of November, A. D. 1885, filed its motion for a new trial, as follows:

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

32 In the Circuit Court of the United States for the Eastern District of Missouri. September Term, 1885.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Defendant.

Now comes the plaintiff in the above cause and moves the court to set aside the finding and judgment of the court herein and grant it a new trial for the reasons following:

1st. Because the finding and judgment of the court are against the evidence and the weight thereof.

2nd. Because the finding and judgment of the court are against the law.

3rd. Because the court erred in finding no liability on the part of defendant for the loss of any of the cars except the two cars belonging to the San Francisco Railway Company.

4th. Because the court erred in not holding that the defendant was liable as a common carrier for all the cars destroyed.

5th. Because the court disregarded the uncontradicted evidence as to the usage and understanding between plaintiff and defendant as to the return to plaintiff of the cars delivered by plaintiff to defendant after being switched to the Advance Elevator.

6th. Because the uncontradicted testimony showed that there was no delivery of the cars received by defendant from plaintiff to the Advance Elevator, as consignee or otherwise.

7th. Because the court erred in holding that the said defendant was only liable as a warehouseman for the loss of the cars
33 burned on its track that were to be unloaded at the said Advance Elevator, and for those that had been unloaded and placed back on defendant's track.

8th. Because the court erred in holding that defendant was not liable as a common carrier for the six cars burned on the elevator track.

9th. Because the damages awarded plaintiff are wholly inadequate and contrary to the evidence and the law.

And thereafter, to wit, on the 5th day of February, A. D. 1886, the court overruled said motion for a new trial; to which action and ruling of the court plaintiff then and there duly excepted.

Wherefore plaintiff presents this its bill of exceptions, and prays the court to allow, sign, and seal the same and make it a part of the

record herein, which is accordingly done this 23rd day of Feb'y, A. D. 1886.

SAMUEL TREAT, [SEAL.]
Judge of the Circuit Court of the United States for the Eastern District of Missouri.

Said bond is in words and figures following, to wit:

34 Know all men by these presents that we, The Missouri Pacific Railway Company, as principal, and M. M. Buck and W. Nichols, as sureties, are held and firmly bound unto the Chicago and Alton Railroad Company in the full and just sum of eleven hundred dollars, to be paid to the said Chicago and Alton Railroad Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the September term, 1885, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between The Missouri Pacific Railway Company, plaintiff, and The Chicago and Alton Railroad Company, defendant, judgment was rendered against the said Chicago and Alton Railroad Company, and the said The Missouri Pacific Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Chicago and Alton Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Missouri Pacific Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

[Seal of Mo. Pac. R'y Co.]

THE MISSOURI PACIFIC R'Y CO., [SEAL.]
By H. M. HOXIE, *Vice-Pres't.* [SEAL.]
M. M. BUCK. [SEAL.]
W. NICHOLS. [SEAL.]

Attest: GEO. C. SMITH, *Ass't Sec'y.*

Approved by—
SAMUEL TREAT, *Judge.*

34*a* [Endorsed:] No. 2458. United States circuit court, eastern district of Missouri. Missouri Pacific Railway Company *vs.* Chicago and Alton Railroad Company. Bond, $1,100.00. ——, principal; ——, sureties. Approved by me— R. H. Kern, def't's att'y. Filed 23d day of Feb'y, 1886. A. P. Selby, clerk.

35 *Opinion of the Court.*

MISSOURI PACIFIC R'Y CO.
vs.
CHICAGO & ALTON R'Y CO.
No. 2458.

NOVEMBER 5TH, 1885.

It appears that the course of through traffic among railroads requires each to receive cars owned by other than the transporting road and forward the same; and, accepting the general principle stated in 109th Illinois Reports, 135, that each road as to said cars by it so received and forwarded to the next road is under the obligations of a common carrier, the case before the court shows that there were ten cars to be delivered to the Advance Elevator and received by the defendant for that purpose. Six of these were actually delivered and were in possession of said elevator. Four of said ten still in actual possession of the defendant had been tendered to said elevator and remained in the custody of the defendant from the inability of the elevator to receive the same when so tendered.

All of these cars were destroyed by fire without any fault of the defendant. As to the six cars actually delivered and so destroyed, there evidently can be no recovery. The duties of the defendant as to the other four of said cars was simply those of a warehouseman. When a common carrier transports merchandise and delivers the same to the consignee its obligations with respect thereto are at an end. If, however, the same are tendered to him, and, through no fault of the carrier, he does not or will not receive the same,
36 the carrier can cause the same to be stored at the risk of the consignee or retain possession of the same simply as a warehouseman. Were this not so, the through traffic from one part to the other of this vast country would compel not only the breaking up, but stoppage of trains, if at the intermediate points of delivery the consignee failed or refused to receive consignments.

In this case, if we treat the transportation of cars as if merchandise to be received and delivered to the consignee, it appears that these cars, with their contents, were to be delivered loaded with grain to the elevator. If both the cars and their contents are to be covered by the same rule, then the delivery of the cars, with their contents, terminated the obligations of the defendant.

The court is not prepared to say that where a railroad car, in the course of through transportation, is received to be delivered to another railroad and has been so delivered that it is bound to cause the same to be returned either to the owner of the car or to the railroad from which the same was originally received, nor that it is under all circumstances entitled to recover in its own name from what may subsequently happen with respect thereto.

In this case, as already stated, there can be no recovery as to the ten cars shipped to the Advance Elevator.

Two other cars were delivered to the defendant, to be sent by it eastward, which were destroyed by the fire alluded to, the value of said cars being $602.35, $100 of the wrecked material having been

received by the plaintiffs. As to said two cars the obligations of a common carrier existed; consequently the defendant is liable for the sum of $502.35, for which judgment is ordered.

37 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proofs in case No. 2458, of Missouri Pacific Railway Company, plaintiff, against Chicago and Alton Railroad Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 28th day of April, in the year of our Lord eighteen hundred and eighty-six.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court,
By —— ——, *Deputy.*

[Endorsed:] No. 2458. United States circuit court, eastern district of Missouri. Missouri Pacific Railway Co. against Chicago & Alton Railroad Co. Duly certified transcript in the above-entitled cause.

38 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States for said District.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Defendant in Error.

Now comes the said plaintiff in error and says that in the record and proceedings of the circuit court of the United States for the eastern district of Missouri, in the above-entitled cause, there is manifest error, and said plaintiff assigns as errors the following, to wit:

1st. The finding and judgment of the court are against the evidence and the weight thereof.

2nd. The finding and judgment of the court are against the law.

3rd. The court erred in finding no liability on the part of defendant for the loss of any of the cars, except the two cars belonging to the San Francisco Railway Company.

4th. The court erred in not holding that the defendant was liable as a common carrier for all the cars destroyed.

39 5th. The court disregarded the uncontradicted evidence as to the usage and understanding between plaintiff and defendant as to the return to plaintiff of the cars delivered by plaintiff to defendant after being switched to the Advance Elevator.

6th. The uncontradicted testimony showed that there was no delivery of the cars received by defendant from plaintiff to the Advance Elevator, as consignee, or otherwise.

7th. The court erred in holding that the said defendant was only liable as a warehouseman for the loss of the cars burned on its track that were to be unloaded at the said Advance Elevator, and for those that had been unloaded and placed back on defendant's track.

8th. The court erred in holding that defendant was not liable as a common carrier for the six cars burned on the elevator track.

9th. The damages awarded plaintiff are wholly inadequate and contrary to the evidence and the law.

And the said plaintiff in error prays that the judgment aforesaid may be reversed and that it may be restored to all things it has lost by reason thereof.

THOS. J. PORTIS,
Attorney for Plaintiff in Error.

Endorsed on cover: E. Missouri C. C. U. S. No. 330. The Missouri Pacific Railway Company, plaintiff in error, *vs.* The Chicago & Alton Railroad Company. Filed September 1, 1886.

OCT 23 1889

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 66.

THE MISSOURI PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,

Of Counsel.

C. G. Burgoyne's Printing Business, 145 Centre Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1889, No. 66.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

THE CHICAGO AND ALTON RAILROAD COMPANY.

Brief for Plaintiff in Error, by John F. Dillon.

STATEMENT.

On various dates from March 5th to 10th, 1884, the plaintiff delivered to the defendant, and the defendant as a common carrier received, twenty-one box cars—nineteen of them loaded with corn or grain consigned to the Advance Elevator, East St. Louis, and two of them loaded with spelter consigned to Phillips & Wagner. All of these cars were either damaged or destroyed by fire while they were in the custody of the defendant as such common carrier. Some of the cars were owned by the plaintiff and some by "foreign" railroad companies. According to the custom of railroad companies the plaintiff

paid the "foreign" companies for the damage and destruction of their cars, and then brought this action to recover from the defendant, for the whole number of twenty-one cars, on its common carrier liability as insurer, claiming damages in the sum of $6,909.77 and costs.

The petition alleged: (1) That the defendant is a common carrier; (2) that the plaintiff delivered to defendant, and defendant as such common carrier accepted, *twenty-one* box cars, the property of plaintiff, to be by said defendant transported over its tracks to the Advance Elevator, there to be unloaded and returned by it to plaintiff, for a reward to it by plaintiff in that behalf paid; and that said defendant has failed to return to plaintiff the cars delivered to it as aforesaid (Record, p. 3).

The answer admitted: (1) That defendant is a common carrier as stated; (2) that *nineteen* of the cars mentioned were delivered to it by the St. Louis Bridge and Tunnel Company to be carried by it to the Advance Elevator; (3) but stated that it had no knowledge or information sufficient to say whether said St. Louis Bridge and Tunnel Company in the delivery of said cars was acting as plaintiff's agent or not; (4) that the defendant promptly delivered seven of said cars to said Advance Elevator; (5) that said seven cars, together with the balance of aforesaid cars, were destroyed by fire at said time without any fault or negligence of defendant; (6) it denied all the rest of the complaint (Record, p. 3).

The replication denied each and every allegation of new matter set up in the defendant's answer (Record, p. 4).

The case was tried by the Court—trial by jury having been waived by stipulation (Record, p. 4).

The Court found in favor of the plaintiff in error, assessing its damage at $502.35 (Record, p. 5). These damages were assessed for the loss of only two cars, minus a deduction of one hundred dollars for value of damaged material returned by the defendant in error (Record, p. 24, bottom).

The Court reached this result through a mistaken impression that only 12 cars were received by the defendant from the plaintiff (although the defendant's answer admitted the receipt and destruction of 19 of the cars mentioned in the petition); finding that 10 of these cars were to be delivered to the Advance Elevator; that 6 of these had been delivered and were in possession of the Elevator Company at the time of the fire; that 4 of the 10 were still in the actual possession of the defendant at the time of the fire, but had been tendered by the defendant to the Elevator Company; that besides the 10 cars mentioned to be delivered to the Advance Elevator there were 2 other cars to be delivered by the defendants to other parties, which 2 were in the possession of the defendants at the time of the fire, and that the defendant was liable only for these 2 cars. The Court assumed throughout that the *cars themselves*, and not merely their cargo, were to be delivered to the Elevator Company.

The position of the plaintiff in error is that all the cars mentioned in the petition, viz., 21 cars, were in the custody of defendant, as a common carrier, at the time of their destruction, and that the plaintiff was entitled to the full recovery sought.

The plaintiff tendered its bill of exceptions (Record,

pp. 5 to 23) on the ground that the findings of the Court in its favor were inadequate on the case made by the pleadings and evidence. The bill of exceptions was sealed by the Court (Record, p. 23), and the plaintiff sued out this Writ of Error (Record, p. 1).

Assignment of Errors.

The plaintiff in error makes the following assignment of errors :

1st. The finding and judgment of the Court are against the evidence and the weight thereof.

2d. The finding and judgment of the Court are against the law.

3d. The Court erred in finding no liability on the part of defendant for the loss of any of the cars, except the the two cars belonging to the San Francisco Railway Company.

4th. The Court erred in not holding that the defendant was liable as a common carrier for all the cars destroyed.

5th. The Court disregarded the uncontradicted evidence as to the usage and understanding between plaintiff and defendant as to the return to plaintiff of the cars delivered by plaintiff to defendant after being switched to the Advance Elevator.

6th. The uncontradicted testimony showed that there was no delivery of the cars received, by defendant from

plaintiff, to the Advance Elevator, as consignee or otherwise.

7th. The Court erred in holding that the said defendant was only liable as a warehouseman for the loss of the cars burned on its track that were to be unloaded at the said Advance Elevator, and for those that had been unloaded and placed back on defendant's track.

8th. The Court erred in holding that defendant was not liable as a common carrier for the six cars burned on the elevator track.

9th. The damages awarded plaintiff are wholly inadequate and contrary to the evidence and the law.

And the said plaintiff in error prays that the judgment aforesaid may be reversed and that it may be restored to all things it has lost by reason thereof.

ARGUMENT.

I.

The Pleadings.

THE FACTS ESTABLISHED BY THE PLEADINGS were: (1) That the defendant is a common carrier; (2) that the defendant received *nineteen* of the cars mentioned in the petition, to be carried by it as such carrier to the Advance Elevator; and (3) that "the balance of aforesaid cars," that is, at least *twelve*, the balance after deducting seven, were in the custody of the defendant as

such common carrier at the time when they were destroyed by fire.

Fact numbered (3) is established by the pleadings, because under the *Missouri* Practice matter of affirmative defense must be stated in the answer, and cannot be proved under a general denial. (This fact was also proved by undisputed evidence.)

Mack vs. Lancashire Ins. Co., 1 Fed. Rep., 193.

Walker vs. Flint, 11 Fed. Rep., 31; S. C., 3 McCrary, 507.

Same law under *New York* Code.

McKyring vs. Bull, 16 N. Y., 297.

The defendant in receiving these cars assumed the liability of a common carrier.

Hannibal R. R. Co. vs. Swift, 12 Wall., 262.

The defendant set up a fact which it claimed exempted it from liability for the destruction of *seven* of the cars, and so attempted to set up matter which should constitute an affirmative defense as to *seven* cars. But as to the remaining *twelve* cars which by its answer it admitted that it received, and as to the other *two* cars which by its answer it denied that it received (but which the testimony of defendant's own witness proved that it did receive), it set up no affirmative defense, but made a mere general denial.

In the absence, therefore, of any affirmative defense with respect to twelve of the cars admitted by the answer to have been received, there was clear liability for the destruction of such twelve cars, and obvious error, to this extent, in the decision of the Court. The Court gave damages for the destruction of two cars (loaded

with spelter consigned to Phillips & Wagner) these cars not being included in the nineteen cars admitted by the answer to have been received, the cargoes of all of which were consigned to the Advance Elevator.

THE FACTS IN ISSUE BY THE PLEADINGS were: (1) Whether the other *two* cars, which the petition alleges and the answer denies were delivered to the defendant, were delivered as alleged; (2) whether the defendant failed to return the cars in good order to the plaintiff; (3) the new matter set up in the answer—namely, (*a*) whether the cars which were received by the defendant were received *from the plaintiff*, through the agency of the Bridge and Tunnel Company; (*b*) whether the defendant delivered seven of said cars to the Advance Elevator; and (*c*) whether the said seven cars with the balance of aforesaid cars were destroyed by fire without any fault or negligence of defendant.

II.

The evidence and the facts established by it.

(1) *The plaintiff delivered, and the defendant as a common carrier received, twenty-one cars.*

John T. Pound testified that two cars, Nos. 2091, 2124, were delivered by the plaintiff to the Bridge and Tunnel Company (Record, p. 7); and J. S. Lake, a witness for the defendant, testified that these two cars were

received by the defendant, and that their cargo of *spelter* was consigned to *Phillips & Wagner* (Record, p. 17 *et seq.*). These two cars were in addition to the nineteen admitted by the answer to have been received, loaded with *grain* consigned to the *Advance Elevator*.

These two cars were not returned in good order, but were destroyed by the fire (Testimony of John Hodge, Record, p. 13 ; of J. S. Lake, Record, p. 20).

It was for these two cars that the Court allowed damages. See Opinion of Court (Record, p. 24), where the value of the two cars is given as $602.35, and testimony of John Hodge, pp. 13, 14, where the same value is given, namely, of car No. 2091, $378.67, No. 2124, $223.68—in all $602.35.

Twenty-one cars, therefore, were delivered and received, *nineteen* with their cargo of *grain* consigned to the *Advance Elevator*, as admitted by the defendant in its answer, and *two* with their cargo of *spelter* consigned to *Phillips & Wagner*, as proved by the defendant's own witness.

(2) *The defendant failed to return any of the cars in good order to the plaintiff.*

There is no controversy on this point. The proof showed that all of the cars were destroyed and scrap iron to the value of $100 only was returned to the defendant. See testimony of John Hodge (Record, pp. 12–15), and of J. S. Lake, witness for the defendant (Record, pp. 17–21). As to the undertaking of the defendant to return the cars to the plaintiff, there is no contradiction in the testimony. The only testimony on this point was that of A. W. Dickinson (Record, p. 16),

from which it appears that that was the established routine of the business with reference to which the defendant contracted.

The location of the cars at the time of the fire.

The evidence shows that at the time of the fire the cars were located as follows :

FIRST. The *two* cars, Nos. 2091, 2124, the cargo of which was consigned to Phillips & Wagner (Record, *p. 17*), were on the track of the defendant at the time when they were burned (Testimony of J. S. LAKE, Record, *p. 21*).

SECOND. *Four* of the cars (the cargo of which was destined for the Advance Elevator), Nos. 1254, 6109, 4859, 438, had not been in the elevator and still remained, loaded, on the track of the defendant at the time when they were burned (Testimony of J. S. LAKE, Record, *pp. 19–21*).

THIRD. There were *six of the twenty-one cars* in the elevator. J. S. LAKE testified (Record, *p. 19*) that there were *seven*, and gave the numbers of the cars as follows : 890, 2341, 6198, 5042, 2181, 9276, 6858. But only *six* of these numbers correspond, even with due allowance for slight errors, to the numbers of the cars that were delivered by the plaintiff to the defendant. Cars Nos. 6198, 5042 and 9276 are evidently the same cars as those testified to by JOHN T. POUND (Record, *p. 7*) and by JOHN HODGE (Record, *p. 13*), as numbered 6498,

5442 and 9270. But No. 2181 bears no resemblance to any of the numbers given in any other part of the record. It cannot be identified with any of the following numbers: 7034, 5813, 1231, 11,763, 864, 3497, for these are all numbers of cars *damaged* and returned (Testimony of JOHN HODGE, Record, *p. 14*), whereas all the cars that were in the elevator were *destroyed* and not returned (Testimony of J. S. LAKE, Record, *p. 19*). Besides the numbers already mentioned, with none of which it is possible to identify 2181, there remain only three numbers of the twenty-one cars which the plaintiff delivered to the defendant (Testimony of JOHN T. POUND, Record, *pp. 6, 7*), namely, 1279, 7560 and 995, and none of these three bear any resemblance to 2181.

So far, therefore, as the record shows, one of the seven cars which the witness for the defendant testified was in the elevator, was not one of the twenty-one cars for which suit was brought. The conclusion, therefore, must be that only *six* of the twenty-one cars were in the elevator at the time when they were burned.

This was also the opinion of the Court (Record, *p. 24*), who found that only six of these cars were in the elevator at the time it was burned.

At best for the defendant, not more than seven cars were in the elevator.

FOURTH. The remainder of the cars, *i. e., nine* (twenty-one minus the twelve, the location of which has already been stated), had been taken into the elevator, unloaded, and returned to the track of the defendant, and still stood there when they were burned (Testimony of defendant's witness, J. S. LAKE, Record, p. 21).

III.

The defendant's relation to these cars was that of common carrier.

The decisions on this point are unanimous.

Peoria & C. Ry. Co. vs. Chic., &c. Ry. Co., 109 Ill., 135.

Vermont, &c. Ry. Co. vs. Fitchburg R. R. Co., 14 Allen, 468.

New Jersey R. R. Co. vs. Penn. Ry. Co., 27 N. J. Law, 100.

Mallory vs. Tioga Ry. Co., 39 Barb., 492.

Chief Justice BIGELOW, states the law and its reason in the *Massachusetts* case, *supra*, as follows:

"We are of opinion, on full consideration, that the defendants are liable for the destruction of the cars of the plaintiffs, under the legal duty and responsibility which attached to them, in consequence of their general undertaking to transport them over their road. We can see no sufficient reason for holding that in performing this service they are not to be regarded as common carriers, and chargeable for any loss not caused by the act of God or the public enemy. It is not denied that the ordinary business of the defendants is that of common carriers, and that where there is no express stipulation for a more restricted liability or the nature of the service which they are called on to render is not such as to impose on them a different kind or degree of responsibility, they would be liable as insurers of property intrusted to them for transportation. But it is urged by the defendant that the relation towards the plaintiffs as owners of a railroad connecting with their own and the consequent duty which they are required to perform of drawing the cars of the plaintiffs over their road, are of a peculiar and exceptional nature, and that they ought not to be held to be carriers within the common law rule in performing this service. It seems to us, however, that the reasons on which this rule is founded do apply with equal force to them when so employed, as when engaged in the ordinary business

which they undertake to carry on. They act in their capacity as public carriers, and receive the cars to transport them from place to place; they draw them by their own engines, the plaintiffs being restrained by law, Gen. Stat., Ch. 63, Sec. 119, from using their own motive power for the purpose; they take the cars into their exclusive custody and control, the plaintiffs and their servants having no charge or care over them whatever; and they receive for the services rendered a reasonable compensation in proportion to the time, labor and expense incurred and the risk which they run. It seems to us that all the elements which go to make up the legal characteristics of the business of a common carrier are included within the statement of the kind of service which the defendant's render in transporting the cars of plaintiffs. It cannot be said that the obligation which the statute imposes on the defendants to draw the cars of the plaintiffs over their road, Gen. Stat. Ch. 63, Sec. 117, affords any ground for limiting their liability for loss or injury to them while in their possession. A like duty is imposed by law on every common carrier. His employment is a public one, and he is bound to carry all articles offered to him coming within the scope of his ordinary employment, for a reasonable compensation. We are unable to see any valid ground for a distinction between the case at bar and the familiar one of a common carrier undertaking to transport the property of another carrier over the route upon which the former usually transacts his business."

The reasoning in the *Illinois* and *New Jersey* cases, *supra*, is also clear and satisfactory to the same effect.

It does not appear that a case directly involving this point has yet been decided by this Court. But in *Hannibal R. R. Co. vs. Swift*, 12 Wall., 272, the case of *Mallory vs. Tioga R'y Co.*, *supra*, was cited with approval.

The Court below, in the present case, assumes the correctness of the general principle above stated (Opinion of Court, Record, *p. 24*; S. C., 25 Fed. Rep., 317).

IV.

The defendant was liable as a common carrier for the loss of twenty-one cars.

Under the rule stated above (Point III.) it is clear that the defendant is liable for *all the cars that were in its possession as common carrier* at the time when they were destroyed by fire. It is only necessary to state the familiar rule that the common carrier is liable as insurer against everything except the act of God or the public enemy. The fire in the present case was neither of these.

Story on Bailments, § 511, and cases cited.

The full number of *twenty-one* cars were in the possession of the defendant as common carrier at the time they were destroyed by fire. It is true that *six* of the cars were in the elevator at the time; but, in legal contemplation, they were none the less in the possession of the defendant.

As to the six cars in the elevator.

The trial Court erred in assuming that the *cars* themselves were to be delivered to the Elevator Company. A delivery of the cars as such to the Elevator Company was never contemplated by any of the parties. The cars were merely run into the elevator so that the *grain* could be delivered. The Elevator Company was not a transportation company, had no rolling stock of its own, and consequently no use for the cars except as incidental to unloading them.

The error of holding that the *cars* were "delivered" to the Elevator Company is well illustrated by the testimony of J. S. Lake, a witness for the defendant. His testimony shows clearly that the cars were all the time under the control of the Railroad Company, and were merely run into the elevator to be unloaded, and then run out again, just the same as any railroad company runs cars into or alongside of its own freight house for a few hours to be unloaded, and then runs them out again. The Railroad Company furnishes the motive power and has control of the movements of the cars as much in the one case as the other.

Mr. Lake stated what he meant by "delivery" to the elevator company, as follows (Record, p. 20):

"Q. What do you mean by their being delivered to the Advance Elevator and their accepting the cars?"
"A. They were put in the Advance Elevator for unloading."

This, surely, is not a delivery of the *cars* to the Elevator Company; the Railroad Company merely put them for a few hours in a place where the Elevator company can unload them readily. The elevator company has nothing whatever to do with the cars themselves.

As well might the teamster engaged in unloading a coal car placed by the Railway Company on one of its side tracks for that purpose be held to be the legal possessor of the car as to say that because the cars were placed on the elevator track to facilitate their unloading they were in legal contemplation in the possession of the Elevator Company.

Illinois Central R. R. Co. vs. Smyser & Co., 38 Ill., 354, was an action for the loss of cotton destroyed by

fire while in the possession of the defendant railroad company as common carrier. "It appears that according to the mode in which this company does business at Cairo, when warehousemen have cotton to ship by rail they apply to the company for the requisite number of cars, and they are sent on the side track of the company to the warehouse, and the shipper there loads the cotton upon the cars, makes out a manifest, and leaves it with the agent of the company, who has the bales counted, and, if found to be correct, a bill of lading is signed, and the company send a locomotive and remove the cars thus loaded and place them in the train for the point to which the shipment is made" (see Opinion of Court, p. 360). In accordance with this custom, the "forwarding firm applied to the Railroad Company for the requisite car for shipping the cotton, and the latter, pursuant to their usage, sent the car on the side track of the company to a point opposite the wharf boat, and during the day the cotton was loaded into the car by the shippers. The company was notified the same evening. On the next morning, before the Railroad Company had counted the bales or issued the bill of lading, the loss by fire occurred." A verdict was rendered for plaintiffs; and the defendant appealed on the ground that the cotton was not in his possession at the time of the fire. But the Court held that the cotton was in the possession of the defendant *as common carrier*, although the car in which it was placed was on a side track for the purpose of allowing the shipper to load it.

This case shows that the *car* itself was also in the possession of the Railroad Company *as a common carrier*, although, for the purpose of loading, it was on a

side track by the shipper's warehouse or boat, and was being loaded by the shipper himself.

So, also, in the present case, although some of the cars were on a side track in the elevator for the purpose of being unloaded, and although they were to be unloaded by the elevator company, yet they were all the time in the possession of the defendant as a common carrier.

In *P. & P. U. Ry. Co. vs. C. R. I. & P. Ry. Co.*, 109 Ill., 135, the Supreme Court of Illinois allowed the the plaintiff to recover for the value of a car which was destroyed by fire while it was standing on a side track at a sugar refinery where it had been placed in order to be loaded. The Court in that case, also, held that the car was as much in the possession of the Railroad Company as a common carrier when the car was on a siding as when on the main track.

The same Court has held that these elevator sidings, although owned by the elevator companies, are for the purposes of delivery a part of the railroad itself.

Vincent vs. Railway Co., 49 Ill., 41.

And the rule is a just one, as it tends to preserve the rights of the owner against the receiving carrier to whose exclusive custody he entrusts his property, and upon whose individual integrity and responsibility he has the right to rely.

See *Bank of Kentucky vs. Express Co.*, 93 U. S., 183.

But, even if it should be held that the defendant was not liable for the loss of the cars that were in the elevator, still the findings and judgment of the Court below were erroneous.

V.

Excluding the cars in the elevator, the defendant was clearly liable as a common carrier for the loss of all the others, i. e., for fifteen.

The testimony is undisputed that all the remaining cars, *i. e.*, fifteen, were on the tracks of the defendant and in its possession at the time of the fire (*ante, p. 9*).

The Court, however, decided that the defendant occupied the relation of warehouseman only, and not that of common carrier, and hence not that of insurer, to four of the fifteen cars which were not in the elevator (Opinion of Court, Record, *p. 24*). The ground on which the Court based this decision was that the four cars had been tendered by the defendant to the Elevator Company, but that the latter had declined to receive them, and thus the relation of common carrier had ceased and that of warehouseman had begun.

No Tender of the Four Cars.

There was (A) no allegation in the defendant's answer, (B) nor any evidence of a tender or offer to deliver to the Elevator Company the four cars that stood on the defendant's track loaded at the time of the fire, and without such tender the defendant was not relieved of its common carrier liability as insurer.

(A) The answer of the defendants contains no allegation whatever that the four cars above mentioned were

tendered to the Elevator Company (Record, *p. 3*). Under the *Missouri* practice such matter of affirmative defense must be pleaded, and cannot be given in evidence under the general denial.

Therefore, no evidence could be introduced to show that a tender was in fact made (see Rule and Authorities, *ante*, *p. 6*).

(B) THERE WAS NO EVIDENCE OF A TENDER of the four cars. The only testimony that had any possible bearing on the subject of a tender was that of J. S. Lake, as follows (Record, *p. 18*) :

"Q. State what became of those cars" (*i. e.*, the whole number received) ; "how many of them were switched in there, if you are able to tell?"

"A. The cars had all been delivered to the Advance Elevator with the exception of three or four which they were not ready to take in and were not unloaded at the time of the fire."

And again (Record, *p. 19*) :

"Q. Can you state how many of them the Advance Elevator had accepted?

"A. All except four.

"Q. Those four cars had not been accepted by the Advance Elevator and were burned?

"A. Yes, sir."

And again (Record, *p. 20*) :

"Four, I say, *had not been delivered to the elevator ;* they were standing on our tracks—the four I mentioned."

This testimony is clearly insufficient to establish a tender of the cars.

Note that there was *no question asked in regard to a tender* of the four cars, and *no statement by the witness*

directly or indirectly upon the question of a tender. The testimony above quoted contains no statement that these four cars were tendered to the Elevator Company, or that that company refused to receive them. There is also a plain statement that they "*had not been delivered*" to the Elevator Company. It is true, the witness stated that the Elevator Company "was not ready to take in" the four cars; but he did not state that the elevator company, or any of its agents, so stated; and this testimony is not a statement either of a tender, or of a refusal such as to make a tender unnecessary. And this was all the testimony that could by any means be construed as having relation to a tender of the four cars. There was, it is to be noticed, no evidence that the Elevator Company was notified of the fact that the cars were ready to be put into the elevator, nor any evidence of any communication whatever with the Elevator Company; and, without such communication, there could of course be no tender. There was no evidence of tender, and the Court erred in finding the fact.

The law is clear, that until a tender or offer to deliver and a refusal to receive, or such a refusal as makes tender unnecessary, the common carrier liability as insurer is not divested.

The carrier's liability as insurer continues until he gives notice or offers to deliver, even though he knows that if such notice were given the person to whom he is to deliver would be unable at the time to receive the property.

Railroad Company vs. Manufacturing Company, 16 Wall., 318.

In that case Mr. Justice DAVIS, giving the opinion of the Court, said (p. 324) :

" Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, *without delivery or an attempt to deliver* to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. *It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or even modify his liability.*"

" Testing the case in hand by these well settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. *They neither delivered nor offered to deliver the wool to the propeller company.* Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder."

" *It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellors, with their means of transportation, to receive and transport the freight* which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive."

But even if there was a proper tender of the four cars, still the findings and judgment of the Court were erroneous.

VI.

At all events the defendant was liable as a common carrier for the loss of all the cars except the six that were in the elevator, and the four that had not been in the elevator and remained loaded on the defendant's track at the time of the fire, i. e. for eleven.

Even if we accept the theory of the Court, that a delivery of the cars themselves to the Elevator Company was contemplated by the parties, and that the placing of the cars on the elevator track constituted a delivery which discharged defendant from its common carrier liability as insurer, also that the four cars had been tendered to the Elevator Company, yet the defendant was liable for the loss of eleven cars.

As has been shown (*ante, p. 9*, and testimony of J. S. Lake, *p. 21*), all the cars except the six that were in the elevator when burned and the four which had not been into the elevator and remained loaded on the defendant's track when burned, *i. e.*, twenty-one minus ten, which is eleven, had been unloaded and retured to defendant Railroad Company, and stood on its tracks when burned.

If defendant's act of placing the cars on the elevator track constituted a delivery to the Elevator Company, certainly the act of the Elevator Company in replacing the cars on the defendant's track after they were unloaded constituted a redelivery to defendant. This is so clear as hardly to need authority, but see *Pratt vs. Railway Co.*, 95 U. S., 43, and cases there cited.

In *Pratt vs. Railway Co., supra*, Mr. Justice HUNT stated the principle which was therein decided as follows (*p. 44*):

"If the deposit of the goods is a mere accessory to the carriage, that is, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received; but when they are subject to the further order of the owner the case is otherwise."

This principle is directly applicable to the present case, for the cars which had been in the elevator and had been unloaded, had been returned to the tracks of the defendant company, and were to becarried by the defendant "*without further orders*" from the Elevator Company or any one else.

The same principle was enunciated in *Connecting Ry. Co. vs. W., St. L. & P. Ry. Co.*, 123 Ill., 594, a case in some respects like the present one, but in others distinguishable from it. In that case the Court (Mr. Justice MULKEY) said (*p. 599*):

"Had the glucose company unloaded and returned the cars, as it was accustomed to do, the defendant's liability as a common carrier would have commenced anew, and continued until they were delivered to the appellee."

VII.

The Court erred in allowing one hundred dollars as a deduction for wrecked material received by the plaintiff from the defendant.

One hundred dollars was the value of all the scrap

iron that was returned from *all* the cars, whereas the amount deducted obviously should have been the value of the scrap iron on *only those two cars, for which a recovery was allowed.* The problem was a simple one: what was the measure of damages for the two cars for which the Court allowed a recovery? Clearly, the value of the two cars, minus the value of the scrap iron returned from the two cars—not minus the value of the scrap iron returned from all the cars. Granting, for the sake of the argument, that there should have been no recovery for the damage or destruction of the other cars, yet those cars, or any material that was left of them, in the condition in which those cars stood after the fire, belonged to the plaintiff, and was not the proper subject of a deduction. The deduction should have been made only on those two cars, merely in order to determine what loss the plaintiff suffered on those two cars, which was, of course, the total value minus the value of the material which was left of the *two.*

Now, the questions and answers of the witness, J. S. Lake (Record, *pp. 19, 20*), with reference to scrap iron returned, refer to *all the scrap iron* that was returned, and not merely to that which was returned from the two cars. On page 19, near the middle, witness states that, "There was the trucks of six, if I recollect right, that were returned. The same witness (Record, *p. 20*), testified that at least 10,000 pounds of scrap iron were returned. A. W. Dickinson testified (Record, *p. 17*, top) that he considered scrap iron worth about one cent a pound. On the testimony of these two witnesses evidently the Court made the deduction of one hundred dollars ($100); for, 10,000

pounds of scrap iron at one cent a pound would be worth exactly one hundred dollars ($100).

The deduction of the full value of the scrap iron returned obviously could only be properly considered as against a recovery of the entire value of all the cars destroyed.

JOHN F. DILLON,
Of Counsel for Plaintiff in Error.

[26013]

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C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1889, No. 66.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

THE CHICAGO AND ALTON RAILROAD COMPANY.

Preliminary Brief.

JOHN F. DILLON, for Plaintiff in Error.

In the main brief accompanying this we have assumed, without discussion, that the questions therein argued arose upon the record of this cause. Whether that is so or not, ought, perhaps, to be briefly presented, since if the point shall not be made by the attorney for the defendant in error (whose brief we have not seen), it will doubtless present itself to the Court, in its consideration of the record.

This was an action at law to recover against the defendant, as a common carrier, for the value of 21 cars which the defendant received as such common carrier, of and from the plaintiff, to be transported over defendant's tracks and delivered to the Advance Elevator,

in East St. Louis, there to be unloaded and then returned to the plaintiff at East St. Louis. The complaint alleged a breach of this duty to the plaintiff's damage, in the sum of six thousand and odd dollars. The defendant admitted, in its answer, the receipt of 19 cars to be carried by it to the Advance Elevator; it averred that it delivered 7 of the cars to the said Elevator, and that said 7 cars and the remainder of said cars were destroyed by fire, without its fault or negligence. There was a replication and denial of the new matter in the answer.

The parties stipulated in writing, waiving a trial by jury, and that the cause should be tried by the Court. It was tried accordingly, and the Court found for the plaintiff in the sum of $502, and rendered judgment in accordance therewith.

There is a bill of exceptions in the record (pages 5–22), which certifies that it is all the testimony in the cause. There is also the opinion of the Court (Record, p. 24) and a motion for a new trial, on the ground, among other things, that the finding and judgment of the Court are against the evidence and the law. The Court overruled this motion for a new trial, to which action and ruling of the Court the plaintiff then and there excepted (p. 22).

In the practice of the State, a bill of exceptions of this character presents on the record a question of law, namely: whether the Court erred in overruling the motion for a new trial, and this question of law will be reviewed by the Supreme Court of the State, on appeal or error. Such is the daily and constant practice. True, the Appellate Court will indulge every reasonable presumption in favor of the decision of the Court

below, and will only reverse such a decision when it is clear and palpable that it erred. That the Court below committed an error in this cause, to the prejudice of the plaintiff in error, is very clear to whoever shall examine the pleadings, the testimony, the opinion and the judgment of the Court. This is fully set forth in the main argument filed herewith.

We are aware of the decisions of this Court construing the Act of March 3, 1865, now embodied in the Revised Statutes as Sections 649 and 700. The point which we wish to submit to the Court for its judgment is, that the question now presented arises, not under the Act of March 3, 1865, but under the fifth section of the Act of Congress of June 1st, 1872, now embodied in the Revised Statutes as Section 914, to the effect:

"That the practice, pleadings, forms and modes of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of Court to the contrary notwithstanding."

When a cause is tried by the Court and it commits a palpable error (as in this case, where the answer admitted that the defendant received nineteen cars to be transported to the elevator, and the opinion shows that the Court by mistake overlooked this fact and said that there were only ten of such cars), what remedy has the unsuccessful party except to move on this ground (as the plaintiff did in this case) for a new trial? If the exception taken to such ruling is unavailable in the appellate court for any purpose, then

the party under those circumstances is remediless to have the error, though palpable and clear, corrected. It is submitted that it is no answer to say that a motion for a new trial will not be reviewed because the granting of such a motion is in the *discretion* of the Court. True, many motions for a new trial are addressed to the discretion of the Court, but it is submitted that there is no discretion, in any proper sense of the term, to overrule a motion for a new trial based on a palpable and plain misconception of a material matter of fact, as in this case a fact admitted by the pleadings. At all events, in the State courts such a ruling may be saved by a bill of exceptions and reviewed in the appellate Court, and it is submitted that it was the purpose of Section 914 of the Revised Statutes to make such practice applicable to the Federal Courts. Such a question does not fall within the purview of the Act of March 3, 1865, Sections 649 and 700, above alluded to.

The case arising on this record is, in view of the suggestions above made and the facts shown in the main brief, not within the rulings of this Court in Indianapolis and St. Louis R. R. Co. vs. Horst, 93 U. S., 291, and the cases there referred to.

JOHN F. DILLON,
For the Plaintiff in Error.

Oct. 30, '89.—50

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 330.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

DEFENDANT'S BRIEF.

ALEXANDER MARTIN,
ROBERT H. KERN,
Attorneys for Defendant in Error.

Nixon-Jones Printing Co., 200-212 Pine Street, St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHICAGO & ALTON RAILROAD COMPANY,
Defendant in Error.

No. 330.

STATEMENT.

This is a suit brought by the Missouri Pacific Railway Company, a Missouri corporation, against the Chicago & Alton Railway Company, an Illinois corporation, both being common carriers, charging that the plaintiff in error delivered to the defendant in error at East St. Louis, in 1884, certain cars, the property of plaintiff, laden with grain, in good order and condition, of the value of $10,000 to be transported by the defendant over its tracks to an elevator in East St. Louis, Illinois, and there to be unloaded and returned by the defendant to the plaintiff at East St. Louis, Ill., in like good order and condition.

That the defendant failed, neglected and refused to return to plaintiff the cars delivered to it, whereby plaintiff sustained damages in the sum of $6,099.77 for which it prayed judgment.

The defendant, in its answer to the petition, denies all allegations of petition not affirmed or admitted, admits that it is a common carrier, and alleges that at the time stated certain of the cars mentioned were delivered to it at East St. Louis, Ill., by what is known as the St. Louis Bridge & Tunnel Company, to be carried by it to the Advance Elevator in said East St. Louis, and stated that it had no knowledge or information sufficient to say whether this Bridge & Tunnel Company, in delivering said cars, was acting as plaintiff's agent or not, and that at said time it promptly delivered seven of said cars to said elevator, and alleges that said seven cars, together with the balance of said aforesaid cars, were destroyed by fire at said time, without any fault or negligence of defendant.

This case was tried without the intervention of a jury, and resulted in a judgment for the plaintiff in the sum of $502.35, from which judgment the plaintiff in error has prosecuted its writ of error to this court.

The judgment of the trial court must be affirmed. The record filed discloses the following facts only: —

1st. A waiver of a jury.

2d. A general finding by the court.

3d. No exceptions taken by plaintiff in error to the rulings of the court in the progress of the trial.

4th. No submissions of propositions of law.

5th. The opinion of the court is not made part of the bill of exceptions.

On this state of facts this court cannot determine whether the facts are sufficient to support the finding of the trial court and as no exceptions were taken to rulings of trial court and no propositions of law were submitted, it comes within the following language of this court: —

"It there be no exceptions to the rulings of the court in the progress of the trial and no special finding of the facts the judgment must be affirmed, as this court has no power to re-examine any question decided by the Circuit Court."

Martinton *v.* Fairbanks, 112 U. S. 670;
Ins. Co. *v.* Boon, 95 U. S. 118–139;
Ins. Co. *v.* Sea, 21 Wall. 160;
The Abbotsford, 98 U. S. 441–3.

For these reasons we respectfully ask an affirmance of the judgment of the Circuit Court,

ALEXANDER MARTIN,
ROBERT H. KERN,
Attorneys for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 88.

PETER RAIMOND, PLAINTIFF IN ERROR,

vs.

THE PARISH OF TERREBONNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OE LOUISIANA.

FILED SEPTEMBER 22, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 88.

PETER RAIMOND, PLAINTIFF IN ERROR,

vs.

THE PARISH OF TERREBONNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OE LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JUNE 14, 1889.

1 UNITED STATES OF AMERICA.

Circuit Court of the United States, Eastern District of Louisiana.

PETER RAIMOND, Plaintiff in Error,
vs.
PARISH OF TERREBONNE, Defendant in Error. } No. 11014.

Transcript of Record.

A. Goldthwaite, Esq., for plaintiff in error; Farrar & Kruttschnitt and White & Saunders, for defendant in error.

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, A. D. 1886.

2 *Petition. Filed May 5, 1885.*

To the judges of the United States circuit court for the eastern district of Louisiana:

The petition of Peter Raimond, a citizen of the State of Mississippi, residing at Bay Saint Louis, respectfully represents that the Parish of Terrebonne, a political corporation of the State of Louisiana and a citizen of said State of Louisiana, having its domicile in the parish of Terrebonne, is indebted to your petitioner in the sum of six thousand dollars and more, for this: that petition- is the holder and owner of seven bonds of one hundred dollars each, and of twenty-seven bonds of fifty dollars each, and of thirty bonds of twenty-five dollars each, with interest-bearing coupons at the rate of eight per cent. per annum attached, payable on the first day of January and July of each year since and including January 1, 1877, the said bonds and coupons attached thereto amounting to the sum of forty-five hundred and ninety-two dollars, and of which amount the sum of twenty-eight hundred dollars bears interest at the rate of eight per cent. per annum until paid, from July 1, 1884.

Your petitioner further shows that the said bonds and coupons were issued by the defendant, The Parish of Terrebonne, pursuant to a loan, and the faith and credit of the parish of Terrebonne were pledged by act No. 74, approved March 23rd, 1874, and found in Acts of General Assembly of Louisiana for 1874, the said

3 bonds bearing date the first day of July, 1874, and maturing ten years after the date thereof, to wit, on the first day of July, 1884. Your petitioner further shows that the said bonds and coupons thereto attached have matured and are unpaid in whole or in part.

Your petitioner attaches the sixty-four bonds, numbered from 1 to 64, inclusive, hereto and makes them parts of his petition.

He avers that he acquired them before maturity, and avers amicable demand.

Wherefore petitioner prays that the said defendant, The Parish of Terrebonne, through its proper officer, be duly cited to appear and answer this petition, and after due proceedings that the said Parish of Terrebonne be condemned to pay to your petitioner the sum of six thousand dollars, with interest on twenty-eight hundred dollars, the principal of said bonds, at the rate of eight per cent. per annum from July first, 1834, until paid, and on coupons from maturity at five per cent., for costs, and general relief.

(Signed) A. GOLDTHWAITE,
Att'y for Pl'ff.

Bond filed, with 63 others, May 5, 1885.

(No. 19.) *Parish of Terrebonne.* (C.)

($25.) (Figure of locomotive.) ($25.)

4 STATE OF LOUISIANA:

Know all men by these presents that the Parish of Terrebonne will pay to bearer the sum of twenty-five dollars, which sum the said Parish of Terrebonne agrees to pay in current money of the United States, at the office of the parish treasurer, to said bearer, in ten years from the date hereof, with interest at the rate of eight per cent. per annum, payable semi-annually, on the 1st day of January and July of each year, on the delivery of the interest coupons attached, at the office of the parish treasurer. **$25.**

For the principal and accruing interest on the bond the faith and credit of the parish of Terrebonne are pledged by the act No. 74, approved March 23d, 1874, and which act is printed in full on the reverse hereof.

In testimony whereof the seal of the district court of said parish is hereunto affixed, and the signatures of a majority of the members of the police jury and of one member elected by the board of commissioners of the parish of Terrebonne, written in their own hand, this first day of July, 1874.

[SEAL.]

(Signed) E. W. CONDON,
W. H. KEYS,
THOS. A. CAGE,
Members of the Police Jury.

[Figure of pelican and young.]

(Signed) F. MARIE,
Commissioner Elected.

Act Written on Reverse of Bond.

5 No. 74.

An act creating a board of commissioners to examine and ascertain the valid outstanding indebtedness of the parish of Terrebonne and authorizing the police jury of said parish to issue bonds to take up and fund the same.

SECTION 1. Be it enacted by the senate and house of representa-

tives of the State of Louisiana in General Assembly convened, That Henry C. Minor, P. E. Bryant, Frederick Marie, Thomas A. Cage, J. L. Belden, all of the parish of Terrebonne, be, and are hereby, declared and constituted a board of commissioners, with full power to examine and determine upon the validity of any and all outstanding claims, obligations, or any kind or character of indebtedness against the parish of Terrebonne, and to call upon all holders of said claims or indebtedness to present them for inspection within a time to be determined by said board of commissioners.

SECTION 2. Be it further enacted, etc., That the police jury of said parish, in conjunction with at least one member of said board of commissioners, to be elected by said board, be, and is hereby, authorized and empowered to issue the bonds of said parish not to exceed twenty thousand dollars, payable to bearer and bearing eight per cent. interest, said interest to be paid semi-annually, for the sole purpose of taking up said indebtedness after inspection and approved by said board of commissioners.

SECTION 3. Be it further enacted, etc., That the bonds issued under the provisions of this act shall be signed by at least a majority of the members of the police jury of said parish and one
6 member of said board of commissioners, to be elected by said board, as is provided in section two of this act, and shall be in denominations of twenty-five, fifty, and one hundred dollars.

SECTION 4. Be it further enacted, etc., That the police jury of said parish shall levy a tax sufficiently large to pay and redeem, annually, one-tenth of the bonds issued by virtue of this act and the interest accruing yearly upon all of the bonds issued under the provisions of this act, said interest to be paid semi-annually and be represented by coupons attached to said bonds.

SECTION 5. Be it further enacted, etc., That the ordinance of or resolution of the police jury of said parish levying a tax and providing for the annual payment of one-tenth, annually, of the amount of bonds issued under this act and the interest, as provided in section four of this act, shall remain in full force until the final redemption of the principal and interest of all the bonds issued under the provisions of this act.

SECTION 6. Be it further enacted, etc., That all the costs and expenses incurred in the issuance of said bonds shall be paid by the police jury of said parish.

SECTION 7. Be it further enacted, etc., That the clerk of the police jury of said parish shall keep a well-bound book in which he shall register the number, date, and amount of each bond issued under the provisions of this act, and to whom issued.

SECTION 8. Be it further enacted, etc., That the bonds issued under the provisions of this act shall be receivable for parish taxes and licenses of the parish of Terrebonne.

SECTION 9. Be it further enacted, etc., That all the bonds paid and redeemed by the parish treasurer or received by him from the
7 tax collector in settlement of taxes or licenses shall be immediately cancelled by him, the treasurer, and the president of the police jury with red ink.

the benefit of all other exceptions and defences which it
11 may be entitled to against the demands in said petition herein.

(Signed) WHITE & SAUNDERS,
Att'ys for Par'h Terrebonne.

Returned Commission. Issued 7th November, 1885, *and Filed Nov. 13th*, '85.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit, Holding Sessions in and for the Eastern District of Louisiana.

To Howard W. Wilkinson or to any judge or justice of the peace or notary public or U. S. commissioner:

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you Peter Raimond, of Bay St. Louis, Mississippi, and him duly examine on the annexed interrogatories, on oath, touching and concerning certain matters and things in a case now depending in said court, wherein Peter Raimond is plaintiff and Parish of Terrebonne is defendant; and the same examinations, so taken and reduced to writing, you certify, under your
12 hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New Orleans, this 7th day of November, anno Domini 1885, and of the Independence of the United States of America the 110th year.

[SEAL.]

(Signed) E. R. HUNT, *Clerk.*

Interrogatories to be Answered, Attached.

United States Circuit Court, Eastern District of Louisiana.

P. RAIMOND
vs.
PARISH OF TERREBONNE. } No. 11014.

Interrogatories to be answered under oath by Peter Raimond, of Bay St. Louis, Mississippi, under a commission issued in the above-entitled suit and addressed to any judge, justice of the peace, notary public, clerk of court, or United States commissioner of said place, said answers to be used in evidence on the trial of the exception herein on behalf of the defendant.

Interrogatory 1st. What is your full name, age, residence, and occupation?

Interrogatory 2d. Are you a citizen of the State of Mississippi? If you are, how long have you been so? When did
13 you become so? Of what State were you a citizen prior to becoming a citizen of the State of Mississippi?

Interrogatory 3d. Were you ever a citizen of the State of Louisiana, or did you ever reside in the State of Louisiana? If you did, state where you resided and how long you resided there.

Interrogatory 4th. In this suit you claim to be the owner of sixty-four bonds of the parish of Terrebonne; state, *a*, from whom did you acquire those bonds; give his full name and address. *b*. When did you acquire them? *c*. What did you pay for them? Did you pay for them in money or by a check? If you say you paid for them by a check, on what bank was the check drawn? If such check has been returned to you, annex it to your answers or state what you have done with it.

Interrogatory 5. Are you the absolute and full owner of the bonds sued on by you? Has any one else any interest, direct or indirect, in said bonds or in the proceeds of any judgment that may be recovered on them? If you answer yes, state who that person is and what is the character and extent of his interest in the bonds or in the proceeds of the judgment that may be recovered thereon.

Interrogatory 6th. Has any portion of the price or consideration which you may say you have paid for said bonds ever been returned to you, directly or indirectly, or is the person to
14 whom you paid such consideration or price under any obligation or agreement, in any event or contingency, to return to you any portion of said price or consideration?

Interrogatory 7. In case you should lose this suit will you be reimbursed by anybody the price you may have paid for the bonds sued on? If so, who is that person?

Interrogatory 8. Did you advance the costs of this suit from your own money or were said costs advanced, directly or indirectly, by any other person? If so, by whom?

(Signed) WHITE & SAUNDERS,
Att'ys for Def't.

May 23, '85.

Service accepted; copy, notice, and oath being waived.
(Signed) A. GOLDTHWAITE,
Att'y for Peter Raimond.

N. O., June 2, '85.

I waive proof of official capacity of any justice of peace taking deposition.
(Signed) A. GOLDTHWAITE.
Nov. 7th, 1885.

STATE OF MISSISSIPPI, *Hancock County:*

In accordance with the annexed commission, issued out of the clerk's office of the circuit court of the United States for the fifth judi-

dial circuit, holding sessions in and for the eastern district of Louisiana, under date of 7th November, anno Domini 1885, and
15 of the Independence of the United States of America the 110th year, bearing teste under the seal of said court and in the hand of the clerk thereof, in the cause therein depending and undetermined between Peter Raimond, plaintiff, and Parish of Terrebonne, defendant, to take the deposition of Peter Raimond, of Bay St. Louis, Mississippi, in the above-entitled cause, upon the annexed interrogatories propounded to said witness, I, Howard W. Wilkinson, a justice of the peace in and for the county of Hancock, State of Mississippi, duly commissioned and qualified and authorized to administer oaths and to take and certify depositions, caused, on this eleventh day of November, A. D. 1885, the said witness, Peter Raimond, to come before me, at my office, in the court-house, in Bay St. Louis, in and for the county of Hancock, State of Mississippi, and having first duly and solemnly sworn him upon the Holy Evangelists to tell the truth, the whole truth, and nothing but the truth in regard to the matters in controversy, he answered and said to the first interrogatory: Peter Raimond; fifty-six (56) years of age; Bay St. Louis, Mississippi; a builder by occupation.

To the second interrogatory he answered: That he is a citizen of the State of Mississippi, and he has been so for twenty years; he became a citizen of Mississippi in 1865; he was a citizen of France before that.

To the third interrogatory he answered: That he never was a citizen of the State of Louisiana, but that he resided in the State of Louisiana prior to the year 1861, for about six months, in the third district, city of New Orleans.

16 To the fourth interrogatory he answered: *a*, That he acquired the sixty-four bonds mentioned from William O'Hern, of New Orleans, State of Louisiana; *b*, he acquired said bonds in the early part of March, A. D. 1884; *c*, he paid thirty cents for every dollar represented in said bonds; he did not pay for them in money nor by a check.

To the fifth interrogatory he answered: He is the absolute and full owner of the bonds sued on by him; that no one else has any interest, direct or indirect, in said bonds, or in the proceeds of any judgment that may be recovered on them.

To the sixth interrogatory he answered: No portion of the price or consideration which he has paid for said bonds has ever been returned to him, directly or indirectly, and the person from whom he got the bonds is under no obligation or agreement in any event or contingency to return him any portion of said price or consideration.

To the seventh interrogatory he answered: If he loses this suit he will not be reimbursed by anybody for what he has paid for said bonds.

To the eighth interrogatory he answered: His agent in the city of New Orleans advanced the costs of this suit out of the revenues of his property in said city of New Orleans.

(Signed) PETER RAIMOND.

And I, Howard W. Wilkinson, justice of the peace as afore-
17 said, do further certify that the above deposition of Peter Raimond was taken down under oath as aforesaid and reduced to writing by me in his presence; that his answers, as above written, were by me read over to and approved by him, and that thereupon the above answers or depositions were sworn to and subscribed by said witness, Peter Raimond, before me, justice of the peace, at Bay St. Louis, county of Hancock, State of Mississippi, this eleventh day of November, A. D. 1885.

(Signed) HOWARD W. WILKINSON,
Justice of the Peace.

THE STATE OF MISSISSIPPI, }
Hancock County. }

I, Emile H. Hoffmann, clerk of the chancery court of said county, certify that Howard W. Wilkinson is a justice of the peace of the county and State aforesaid, duly qualified and commissioned as such, and that all his official acts are entitled to full faith and credit, and that his signature above is genuine.

[SEAL] Given under my hand and official seal, affixed at office, in Bay St. Louis, this the eleventh day of November, 1885.

(Signed) E. H. HOFFMANN,
Chancery Clerk.

Plea to Jurisdiction Overruled.

18 Extract from the Minute Book, November term, 1885.

NEW ORLEANS, SATURDAY, *December 5th*, 1885.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, district judge.

PETER RAIMOND
vs.
PARISH OF TERREBONNE. } No. 11014.

This cause came on to be heard on the defendant's plea to the jurisdiction of the court; whereupon by consent and on the motion of counsel for the parties respectively, it was ordered that said plea be overruled, and that the defendant be allowed a delay of two weeks from this date to file its answer herein.

Answer. Filed January 12, 1886.

United States Circuit Court, 5th Circuit, Eastern District of Louisiana.

PETER RAIMOND
v.
PARISH OF TERREBONNE. } No. 11014.

Now into this honorable court, through its undersigned
19 attorneys, comes the defendant in the above entitled and numbered suit, and for answer to plaintiff's petition herein

says that respondent denies all and singular the allegations contained in said petition, except as may be hereinafter admitted.

Further answering, respondent says that the bonds herein sued on are utterly null and void and evidence no valid legal indebtedness against respondent, on the grounds following, to wit: (1) Because said bonds were not issued by the authority of the police jury and one commissioner, as provided for and contemplated in the act of the Legislature under which said bonds purported to have been issued, to wit, act No. 74 of the acts of the General Assembly of Louisiana for the year 1874; (2) because no public ordinance, as required by law, was ever passed by the police jury authorizing the issuance of said bonds, nor was any ordinance ever passed determining the amount of bonds issued or to be issued and fixing the rate of taxation necessary to redeem the bonds and pay the interest thereon, as required by the said act of the Legislature; (3) because no public ordinance, as required by law, was ever passed by the police jury of said parish determining a period when the said bonds should be due and payable and prescribing the form of said bonds; that all the resolutions of the police jury of said parish respecting said bonds are null and inoperative, because no bonds of the parish of Terrebonne were in existence at the time of the passage of said resolutions, or are now in existence, requiring the levy of a tax for their redemption, and that the said resolutions are powerless
20 to infuse vitality into the lifeless, dead instruments sued on in this case. Respondent avers that the bonds sued on were put on the market by unauthorized parties and formed part of a scheme to defraud the people of the parish of Terrebonne, and were taken by the plaintiff in this suit at his own risk and peril, and that no script of any kind was delivered to the police jury in exchange for the same.

Respondent further avers that the plaintiff in this case is not a *bona fide* holder for value, but that he acquired the said bonds after their invalidity and nullity had been declared by the supreme court of the State of Louisiana, and was bound by said decision.

Wherefore respondent prays that the demand of plaintiff be rejected at his costs, and for all general and equitable relief.

(Signed) WHITE & SAUNDERS,
Att'ys for Def't.

Plea of Prescription. Filed 24 *March*, 1886.

United States Circuit Court, Eastern District of Louisiana.

P. RAIMOND
vs.
PARISH OF TERREBONNE. } No. 11014.

Now comes the defendant in the above entitled and num-
21 bered suit and pleads the prescription of five years to all the coupons herein sued on which matured on or before January

1st, 1880, the coupons against which this prescription is pleaded, being numbered from one to eleven, both inclusive.

(Signed) WHITE & SAUNDERS,
FARRAR & KRUTTSCHNITT,
Att'ys for Def't.

March 23, '86.

Jury Withdrawn and Case Continued.

Extract from the Minute Book, November term, 1885.

NEW ORLEANS, WEDNESDAY, *March* 24, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

PETER RAIMOND
vs.
PARISH OF TERREBONNE. } No. 11014.

This cause, as continued from yesterday, was this day resumed; and the counsel for the respective parties, as well as the jurors empanneled in the said cause, being all present, the trial was proceeded with, and, after hearing pleadings and evidence, the
22 parties in interest agreed at the bar and in open court to waive the intervention of a jury; whereupon G. E. Courtin, one of the jurors, by consent of parties, was withdrawn from the jury, the said panel of jurors was discharged from further consideration of the cause, and the said cause was continued, to be heard hereafter before their honors the circuit judge and the district judge, sitting *en banc.*

Hearing and Submission.

Extract from the Minute Book, November term, 1885.

NEW ORLEANS, FRIDAY, *April* 2, 1886.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

PETER RAIMOND
vs.
PARISH OF TERREBONNE. } No. 11014.

This cause came on to be heard before the circuit and district judges, and was argued by the counsel for the parties respectively, and submitted, and the court took time to consider.

23 *Motion for New Trial. Entered and Filed 8 April, 1886.*

U. S. Circuit Court, Eastern District of Louisiana.

PETER RAIMOND
vs.
THE PARISH OF TERREBONNE. } No. 11014.

On motion of A. Goldthwaite, Esq., attorney for pl'ff, and on suggesting to the court that this cause was submitted on a matter of law and not a question of fact, to wit, the sole question as to whether the matter at issue was the construction of a municipal statute or the construction of a contract under the general commercial law, and the counsel being engaged in the preparation of an agreed statement of facts to be hereafter submitted, and on suggesting to the court that a different statement of facts can be proven than the facts as found by the court, it is ordered by the court that the defendant, through its attorneys, Mess. Farrar & Kruttschnitt and White & Saunders, do show cause on Saturday, April 17th, 1886, at 10 o'clock a. m., why said judgment rendered April 8th, 1886, should not be set aside and a new trial granted to plaintiff.

Marshal's Return.

Received April 9, 1886, by the U. S. marshal, and on the 9
24 day of April, 1886, I served a true copy of the within motion for new trial on the within law firm as follows: On Farrar & Kruttschnitt by handing the same to Mr. Kruttschnitt in person; — White & Saunders by handing the same to Mr. White in person.

(Signed) R. B. PLEASANTS, *U. S. Mar.*
JNO. BAKER, *Deputy U. S. Mar.*

New Trial Refused.

Extract from the Minute Book, April term, 1886.

NEW ORLEANS, SATURDAY, *June* 12, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

PETER RAIMOND
vs.
THE PARISH OF TERREBONNE. } No. 11014.

This cause came on to be heard on the motion of the plaintiff for a new trial, and was argued by counsel; whereupon and upon consideration thereof it was ordered that said application for a new trial be refused, and that the judgment herein remain undisturbed.

25 *Judgment.*

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1885.

NEW ORLEANS, THURSDAY, *April* 8, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

PETER RAIMOND
vs.
THE PARISH OF TERREBONNE. } No. 11014.

The parties in this cause having in open court waived the intervention of a jury and submitted the cause to the court on the facts set forth in the opinion by Mr. Justice Manning, in Rabasse *vs.* Parish of Terrebonne, 30 Ann., 287, and the court, having considered the said agreed statement of facts and being advised in the premises, finds the issues of law raised by the pleadings in favor of the defendant; and for the reasons assigned by the court in the opinion this day read and filed—

It is ordered, adjudged, and decreed, both the circuit and district judges concurring, that there be judgment in favor of the defendant, The Parish of Terrebonne, with costs, and against the
26 demands of the plaintiff, Peter Raimond.

Judgment rendered April 8, 1886.
Judgment signed June 12, 1886.
(Signed) EDWARD C. BILLINGS, *Judge.*

Motion for Writ of Error. Entered and Filed 12 *June*, 1886.

U. S. Circuit Court, Eastern Dist. of La.

PETER RAIMOND
vs.
THE PARISH OF TERREBONNE. } No. 11014.

On motion of A. Goldthwaite, Esq., attorney for plaintiff, and on suggesting that a final judgment has been rendered in the above-entitled cause, and that there is error in the same, and that plaintiff desires to take a writ of error to the Supreme Court of the United States to correct the same—

It is ordered by the court that a writ of error be allowed to plaintiff, returnable to the United States Supreme Court on the second Monday of October next, 1886, upon his entering into bond, with good and sufficient security, in the sum of five hundred dollars, conditioned according to law.

27 & 28 *Bond for Writ of Error. Filed June* 12, 1886.

UNITED STATES OF AMERICA:

Know all men by these presents that we, Peter Raimond, as principal, and William O'Hern, as surety, are held and firmly bound, jointly and severally, unto the Parish of Terrebonne in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Parish of Terrebonne, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 12th day of June, in the year of our Lord eighteen hundred and eighty-six.

Whereas the said Peter Raimond having heretofore, to wit, on the 12th day of June, 1886, taken a writ of error to the Supreme Court of the United States from and to reverse the decree rendered on the 12th day of June, 1886, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Peter Raimond *vs.* The Parish of Terrebonne, No. 11014 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden Peter Raimond shall prosecute his said writ of error to effect and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

29 (Signed) PETER RAIMOND, [L. S.]
By A. GOLDTHWAITE, *Att'y.*
(Signed) WM. O'HERN. [L. S.]

Signed, sealed, and delivered in the presence of—
——— ———.
——— ———.

Bond approved.
(Signed) EDWARD C. BILLINGS, *Judge.*
June 12, 1886.

UNITED STATES OF AMERICA, *District of Louisiana,* } *ss:*

Personally appeared William O'Hern, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides at No. 388 Camp St., city of New Orleans, and is worth the full sum of five hundred dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) WM. O'HERN.

Subscribed and sworn before me this 12th day of June, 1886.
(Signed) E. R. HUNT,
Commissioner U. S. Circuit Court, District of Louisiana.

30 *Statement of Facts and Conclusions of Law. Filed June* 12, 1886.

United States Circuit Court, Eastern District of Louisiana.

PETER RAIMOND
vs.
PARISH OF TERREBONNE. } No. 11014.

It is agreed in this case that a jury shall be waived, and that the case shall be tried before the court upon the following statement of facts:

The plaintiff is a builder, who lives at Biloxi, in Mississippi. He produces and files in evidence seven bonds of one hundred dollars each, twenty-seven bonds of fifty dollars each, and thirty bonds of twenty-five dollars each, and to each of these bonds is attached sixteen interest coupons, being interest coupons from the 1st day of January, 1877, to 1st day of July, 1884, inclusive of both, being the bonds and coupons sued on. The following is the form of each of said bonds:

"No. —. Letter —. $25.

STATE OF LOUISIANA, *Parish of Terrebonne.*

Know all men by these presents that the Parish of Terrebonne will pay to bearer the sum of twenty-five dollars, which sum the said Parish of Terrebonne agrees to pay in current money of the United States, at the office of the parish treasurer, to said bearer in ten years from date thereof, with interest at the rate of eight per cent. per annum, payable semi-annually on the first day of January and July of each year, on the delivery of the interest coupons
31 attached, at the office of the parish treasurer. For the principal and accruing interest on the bond the faith and credit of the parish of Terrebonne are pledged by act No. 74, approved March 23rd, 1874, and which act is printed in full on the reverse hereof.

In testimony whereof the seal of the district court of said parish is hereunto affixed and the signature- of a majority of the members of the police jury and of one member elected by the board of commissioners of the parish of Terrebonne, written in their own hand, this first day of July, 1874.

(S'g'd) E. M. CONDON,
W. H. KEYS,
THOS. A. CAGE,
Members of the Police Jury.

(S'g'd) F. MARIE,
Commissioner Elected."

In the left-hand corner of each bond is impressed a seal of the following device: In the centre a pelican brooding over her young, and in letters around it the words "Clerk of the parish of Terrebonne,'

which is the seal of the clerk of the district court of said parish. On the back of each of said bonds is printed in full act No. 74 of the acts of 1874 and written the words "Registered July 1st, 1874. John H. Aitkins, clerk of the police jury."

The plaintiff swears that he obtained these bonds under the circumstances and in the manner set forth in his deposition on file in this cause, which is hereto annexed and made part of this statement. He produced and swore William O'Hern, the person from whom he claims to have bought them, who testified that in November or December, 1878, or early in the year 1879, Thomas A. Cage, a planter in the parish of Terrebonne, one of the persons who signed said bonds, and being the Thomas A. Cage mentioned in said act No. 74, pledged these bonds to the firm of M. Shelley & Co.,
32 of which he, the said O'Hern, was a member, as security for the advances made and to be made by said firm to said Cage to conduct his plantation; that the said firm of M. Shelley & Co. retained possession of these bonds under said pledge until about April, 1883, when the said Thomas A. Cage made and executed to said firm the power of attorney produced and filed by said plaintiff, annexed to this statement of facts and marked "Exhibit A;" that under this power of attorney he, the said O'Hern, attempted to sell said bonds and was unable to do so at any price; that at the time he knew all about the decision of the supreme court of Louisiana, rendered and published in the month of February, 1878, styled State *ex rel.* Rebasse *vs.* Police Jury Parish of Terrebonne, and printed at page 287, vol. 30, La. An. Rep. of the Supreme Court of Louisiana for the year 1878.

That in the month of March, 1885, he sold these bonds to Peter Raymond, to be paid for at the rate of thirty cents on the dollar, and to be paid when the said Raymond should succeed in getting a judgment on said bonds in the United States circuit court for the eastern district of Louisiana; that he had never reported this sale to Cage, nor had his partner, Mr. Shelley, concurred with him in this sale or taken any part in it; that he had never credited the amount of this sale on the judgment against Cage, as set forth in document "A," and that he had retained possession of said bonds after said sale until he was called upon to deliver them to the counsel of said Raymond for the purposes of bringing this suit. Thereupon the plaintiff offered in evidence act No. 74 of 1874 and rested.

33 The defendants proved that the bonds had been issued in the following manner and under the following circumstances: In April, 1874, the persons mentioned in act No. 74 as a board of commissioners assembled and elected F. Marie as a commissioner to act in conjunction with the police jury of the parish, as provided in sections 2 and 3 of said act; that this board of commissioners held various and sundry meetings, elected J. L. Beldon secretary of said board, and passed upon and approved about fifteen thousand dollars of alleged claims against the parish of Terrebonne. They kept no record of what these claims were, and they destroyed the evidence of indebtedness as soon as the claim was passed. They made no process verbal of this destruction, no list of claims allowed or claims

rejected. They made no report to the police jury of the claims passed upon by them, and no statement or report to the police jury of said parish of any kind or nature. The police jury of the parish of Terrebonne never passed any ordinance or resolution authorizing or directing the issuance of bonds, or any resolution naming the three members of the police jury who were to sign said bonds, or any resolution determining the date of maturity of said bonds or the amount of them which were to be issued, or any ordinance or resolutions whatsoever with reference to said bonds, except those set forth in the report of G. Montague, expert, which is annexed and made part of this statement of facts and marked Exhibit B. Said bonds were never in the possession of the police jury or any of the officers of the police jury, and were not issued by the police jury or any of the officers of the police
34 jury, but were issued under the following circumstances, to wit: The committee appointed to obtain blank bonds obtained the same and delivered them to J. L. Beldon, secretary of the board of commissioners. The bonds were then signed by Marie and three members of the police jury while they were in the possession of Beldon, and the book containing the bonds was delivered to the clerk of the police jury, with instructions to sign the same, as above stated, and with instructions to fill up the stubs, showing to whom each bond was issued, in accordance with a list furnished by Beldon. The bonds were then delivered to Beldon, who undertook to deliver them to the various persons in whose favor the commission had passed claims, and the persons to whom the bonds were delivered gave receipts to Beldon. This book of registry remained in the possession of said Beldon from that day down to the time of his death. The defendants further offered to prove and to show that all of the one-hundred-dollar bonds sued on in this case and nine of the fifty-dollar bonds purport to have been issued to Julius Brette, of the city of New Orleans, on parish scrip presented to the board of commissioners by said Julius Brette; that said Julius Brette never had any parish scrip of the parish of Terrebonne, never presented any parish scrip to the police jury, and never received from said police jury any bonds; that the receipts book in the possession of Beldon shows a blank receipt for these bonds unsigned; that all of the balance of said bonds were issued to Thomas A. Cage and to Frederick Marie, members of the board of commissioners mentioned in said act, which testimony the court refused to admit.

(Signed) FARRAR & KRUTTSCHNITT,
Att'y's Def't.

(Signed) ALFRED GOLDTHWAITE,
Att'y for Pl'ff.

35 The court further finds that it was admitted on the trial herein that as far as the facts were stated in the case of Rabasse *vs.* Police Jury of Terrebonne Parish, in the opinion of Mr. Justice Manning, reported in 30 La. Ann. T., p. 287, they were a correct statement of the facts of this case, though each party claimed that there existed additional facts beyond those stated in said opinion.

The court finds as the conclusions of law—

I. That the construction given to the statute authorizing the issue of bonds for the debts of said parish should in this cause, and as to the points determined in said cause by the supreme court of this State—*i. e.*, Rabasse *v.* The Parish—should be deemed and held as the construction of a municipal law and not as that of a commercial law, and is therefore binding upon this court; and, further, that if said construction should be deemed and held as that of a commercial law, then the court adopts it as a just and proper inference from the facts of the case.

II. That all the coupons maturing prior to the 9th day of May, A. D. 1880 (the service of the citation herein having been made on May 9th, A. D. 1885) are prescribed, and action upon the same is barred.

III. That the petition herein should be dismissed, and that there be judgment for defendant.

(Signed) EDWARD C. BILLINGS, *Judge.*

June 12, 1886.

36 EXHIBIT "A."

Power of Attorney Offered by Plaintiff and Referred to in the Statement of Facts.

HOUMA, PARISH OF TERREBONNE, *April*, 1883.

Whereas I pledged to the firm of M. Shely & Co., now in liquidation, a lot of scrip of the parish of Terrebonne to secure a debt due by me to said firm, and on which debt judgment has been obtained against me: Now, therefore, I agree to and do hereby authorize and empower the members of the said firm of M. Shelly & Co., viz., M. Shelly and William O'Hern, to sell the said scrip at public or private sale, as may to them appear best, and to apply the proceeds of sale to the satisfaction, wholly or in part, as the case may be, of the judgment obtained against me. If sold at vendue, it should be after ten days' advertisement in one of the newspapers of New Orleans and by a licensed auctioneer.

(Signed) THOS. A. CAGE.

EXHIBIT "B."

Report of G. Montégut, Expert, Relating to Bonds Offered by Plaintiff and Referred to in Statement of Facts.

37 State of Louisiana, 15th Dis't Court, Terrebonne.

STATE *ex rel.* E. RABASSE
vs.
POLICE JURY & *als.*
} No. 4002.

To G. Montegut, Esq., residing in the parish of Terrebonne, Greeting:

You are hereby notified that by an order of the fifteenth judicial

district court in and for Terrebonne parish, La., you were this day appointed an "expert" to examine the minute book of the police jury from page 145 to the end of the proceedings of said body in said minute book, and report to this hon. court within the shortest possible delay all ordinances, resolutions, *and* etc., relating to or in anywise appertaining to the bonds issued by the police jury under act 74 of the acts of the General Assembly of Louisiana of 1874. You are further notified to take the necessary oath required by law.

Witness the Hon. Taylor Beattie, judge of said court, at Houma, La., Oct. 6th, 1877.

[SEAL.] (Signed) E. W. CONDON,
Clerk of said Court.

I, Gabriel Montegut, do solemnly swear that I will well and truly act as expert, as per appointment of the 15th dis't court in and for Terrebonne parish, La., and will well and truly report all ordinances, resolutions, & etc., in minute book of police jury, from page 145 forward, relating to or in anywise appertaining to the bonds issued by police jury under act No. 74 of 1874, and will
38 so report, said report to be used as evidence in case of State *ex rel.* E. Rebasse *vs.* Police Jury & *al.*, so help me God.

(Signed) G. MONTEGUT.

Sworn to & subscribed before me this 6th day of October, 1877.

[SEAL.] (Signed) E. W. CONDON,
Clerk of Court.

THE STATE OF LOUISIANA, }
Parish of Terrebonne. }

I, Gabriel Montégut, undersigned expert, duly appointed by the 15th judicial district court in and for the parish of Terrebonne, acting under a commission from said court bearing date October 6th, 1877, which said commission is hereto annexed and made part hereof, do hereby certify that I have carefully examined and scrutinized from the minute book of the police jury of the parish of Terrebonne all of the proceedings of said police jury from their sitting of May 1st, 1874, page 145, forward to the end of their said proceedings, being the meeting held on September 17th, 1877, ending on page 285, and that the following ordinances, resolutions, &c., relating to or in anywise appertaining to the bonds issued by the police jury of this parish under act 74 of General Assembly of Louisiana of 1874 are the only ones therein contained and mentioned, to wit:

39 1st. At meeting of May 1st, 1874, resolution by T. A. Cage adopted:

"That a committee of two be appointed by the president to secure blank books for the purpose of bonding parish debt according to act No. 74 of the General Assembly, 1874."

President appointed on said committee T. A. Cage & W. H. Keys.

2nd. At meeting May 23d, 1874, resolution by E. W. Condon adopted unanimously:

"Be it resolved by the police jury of the parish of Terrebonne, That the tax-collector be requested to turn over to parish treasurer the sum of ($250.00) two hundred and fifty dollars for licenses as soon as collected, and said money to be turned over to the committee appointed by the police jury to purchase blank books for the purpose of bonding the parish debt."

3rd. At meeting July 31st, 1874, resolution by Austin Kennedy adopted:

Be it resolved by the police jury of the parish of Terrebonne, That, in accordance with act No. 74 of the General Assembly of 1874, there shall be, and is hereby, levied a tax of six hundred and sixty-five dollars on the assessment-rolls of 1873 to pay and defray the semi-annual interest accruing on the bonds which have been issued on the provisions of said act.

Be it further resolved, That the tax-collector of this parish of Terrebonne be, and is hereby, directed to proceed forth-
40 with to collect said tax.

Be it further resolved, That the parish treasurer shall set apart and keep said tax, when paid over to him, as a special fund for the payment of the semi-annual interest accruing on said bonds."

4th. At meeting August 25th, 1874, communication of F. R. Wright, tax-collector, was presented and laid over for consideration, which reads as follows:

"PARISH OF TERREBONNE, *August 25th*, 1874.

Mr. PRESIDENT AND GENTLEMEN: At your last meeting your hon. body levied a tax to pay interest on the bonds issued, which places me in a hostile position with the people, as I have already collected from a great many, and by going to them again will cause them to think we are oppressing them. I think it advisable to assess the tax for next year.

Respectfully submitted.

(Signed) F. R. WRIGHT,
Tax-Collector."

5th. At a meeting March 9th, 1875, resolution by Robert Carter adopted:

Be it resolved by the police jury of Terrebonne parish, That a tax of one mill be, and is hereby, levied on all the taxable property of this parish to meet the interest and take up one-tenth of said bonds—parish bonds—and that said tax be collected in U. S. currency according to law.

6th. At meeting August 14th, 1875, resolution by F. R. Wright:

"Whereas act No. 74, creating a board of commissioners to
41 examine and ascertain the valid outstanding indebtedness of the parish of Terrebonne, and authorizing the police jury of said parish to issue bonds to take up and fund the same; and

Whereas said board, in accordance with section 1 of said act No. 74, limited the time within which said claims of indebtedness should be presented to them for inspection: Therefore

Be it resolved, That all claims against the parish not inspected, approved, or funded within and up to the time fixed by said board for the inspection and to determine upon the validity of said claims be, and they are hereby, repudiated.

Be it further resolved, That nothing in this resolution shall be so construed as to affect claims approved subsequent to the adjournment of said board of commissioners, and this resolution to go into effect from and after its passage."

Adopted.

7th. At meeting May 4th, 1876, ordinance by E. W. Condon:

"Be it ordained by the police jury of Terrebonne parish, That the resolution of this body levying a tax to take up one-tenth of the bonds issued in accordance with act No. 74 of the State of Louisiana be, and the same is hereby, amended so as to read as follows:

Be it ordained by the police jury of Terrebonne parish, That, in accordance with section 4 of act No. 74 of the State of Louisi-
42 ana, there be, and is hereby, levied a tax of one mill on the dollar upon all taxable property of the parish, said tax to be collected in U. S. currency, and to be used for the purpose of taking up one-tenth of the bonds issued in accordance with said act, as ordained by section 4 of said act; and

Be it further ordained, That there be, and is hereby, levied, in accordance with section 4 of act 74 of the State of Louisiana, a tax of one and a half mills on the dollar upon all taxable property of this parish, said tax to be collected in U. S. currency, and to be used in paying the interest annually accruing upon the bonds now outstanding issued in accordance with act No. 74 of the State of Louisiana; and

Be it further ordained, That this ordinance take effect from and after its passage."

On motion of Mr. T. M. Gage, the above resolution levying taxes for bonds be postponed until Saturday, the 6th instant, for further consideration, as it was a question of vital importance. Adopted.

8th. At meeting May 6th, 1876, the following opinion was received from the parish attorney; which, upon motion of Mr. T. M. Cage, was spread upon the minutes:

"HOUMA, LA., *May 6th*, 1876.

To the president and members of the police jury of Terrebonne:

While I have my doubts about the constitutionality of sections 4 and 5 of act No. 74 of 1874, yet I don't see how the police jury can refuse to enforce the provisions.

The tax-payer is the proper one to test the constitutionality
43 thereof.

To ask the police jury not to levy the tax because of the above objection to the sections 4 and 5 would be requiring them to perform judicial functions.

I believe it the duty of the police jury to enforce the above sections of the said law.

Respectfully,

(Signed) CHAS. W. DUROY,
Parish Attorney."

9th. Same meeting, ordinance by E. W. Condon adopted:

Be it ordained by the police jury of Terrebonne parish, That the resolution of this body levying a tax to take up one-tenth of the bonds issued in accordance with act No. 74 of the State of Louisiana be, and the same is hereby, amended so as to read as follows:

Be it ordained by the police jury of Terrebonne parish, That, in accordance with section 4 of act 74 of the State of Louisiana, there be, and is hereby, levied a tax of one mill on the dollar upon all taxable property of the parish, said tax to be collected in U. S. currency, and to be used for the purpose of taking up one-tenth of the bonds issued in accordance with said act; and

Be it further ordained, That there be, and is hereby, levied, in accordance with section 4 of said — 74 of the State of Louisiana, a tax of one and a half mills on the dollar upon all taxable property of this parish, said tax to be collected in U. S. currency, and to be used in paying the interest annually accruing upon the bonds now outstanding issued in accordance with act No. 74 of the State of Louisiana; and

44

Be it further ordained, That this ordinance take effect from and after its passage." Adopted.

10th. In the report of the finance committee submitted to the police jury (& by them accepted) at their sitting July 2nd, 1877, I find therein the following reference to bonds, to wit:

"To the president and members of the police jury of the parish of Terrebonne:

The undersigned, finance committee, beg to report that we find that there were issued under act of 1876 bonds as follows:

55	bonds of	$100.00	each	$5,500 00
118	" "	50.00	"	5,900 00
171	" "	25.00	"	4,275 00
	Making a total of			$15,675 00

of this amount $925.00 was cancelled by order of court and $1,450.00 has been redeemed or taken as taxes, leaving a balance of bonds outstanding of $13,300.00, &c., &c.

Respectfully submitted.

(Signed) A. W. CONNELY, *Chairman.*
H. O'ROURKE.
DAN'L THOMAS."

I, expert aforesaid, do further certify that the foregoing ordinances, resolutions, &c., ten in number, are true and correct copies from the proceedings of the police jury of Terrebonne parish, and are taken therefrom *verbatim.*

Houma, La., Oct. 6th, '77.

(Signed) G. MONTEGUT, *Expert.*

45 *Agreement Between Counsel for Pl'ff & D'f'ts as to Statement of Facts.*

It is agreed that the foregoing statement of facts shall be submitted to the court; that the court shall find the facts in accordance therewith, and change the law so that a bill of exception may be made up or error be assigned to the Supreme Court.

(Signed) FARRAR & KRUTTSCHNITT,
Att'ys Def't.

(Signed) ALFRED GOLDTHWAITE,
Att'y for Pl'ff.

46 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 45 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Peter Raimond *v.* Parish of Terrebonne, No. 11014 of the docket of the said court.

Seal of U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness my hand and seal of said court, at the city of New Orleans, this 6th day of August, A. D. 1886.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 6th day of August, A. D. 1886.

EDWARD C. BILLINGS, *Judge.*

47 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Peter Raimond, plaintiff, and The Parish

of Terrebonne, defendant, a manifest error hath happened, to the great damage of the said Peter Raimond, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 12 day of June, in the year of our Lord one thousand eight hundred and eighty-six.

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

48 [Endorsed:] United States circuit court. No. 11014. P. Raimond, plaintiff in error, *versus* Parish of Terrebonne, defendant in error. Writ of error. Filed June 12, 1886. E. R. Hunt, clerk.

49 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Parish of Terrebonne, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Peter Raimond is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Peter Raimond, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12 day of June, in the year of our Lord one thousand eight hundred and eighty-six.

EDWARD C. BILLINGS, *Judge.*

50 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11014. Peter Raimond, plaintiff in error, *vs.* The Parish of Terrebonne, defendant in error. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed June 25, 1886. E. R. Hunt, clerk.

Marshal's Return.

Received Jun- 12, 1886, by the U. S. marshal, and on the 25th June, 1886, I served a true duplicate of the within citation in error on The Parish of Terrebonne, appel-ees herein, defendants in error, by handing same to Mr. White in person, of the firm of White & Saunders, attorneys, who accepted service of same for himself and Mr. E. H. Farrar, they (E. D. White & E. H. Farrar) being the attorn*ies* of record of said parish of Terrebonne.

R. B. PLEASANTS,
U. S. M'l, East'n Dist't of La.,
By JNO. BAKER,
Dep'ty U. S. M'l.

I, John Baker, being duly sworn, do depose and say that I am a deputy marshal for the eastern district of Louisiana; that the above service was made by me and is correctly stated as above.

JOHN BAKER.

Subscribed and sworn before me June 25, 1886.

E. R. HUNT,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Endorsed on cover: E. Louisiana C. C. U. S. No. 88. Peter Raimond, plaintiff in error, *vs.* The Parish of Terrebonne. Filed September 22, 1886.